

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1922

No. 136

**THE VALLEY FARMS COMPANY OF YONKERS,
PLAINTIFF IN ERROR,**

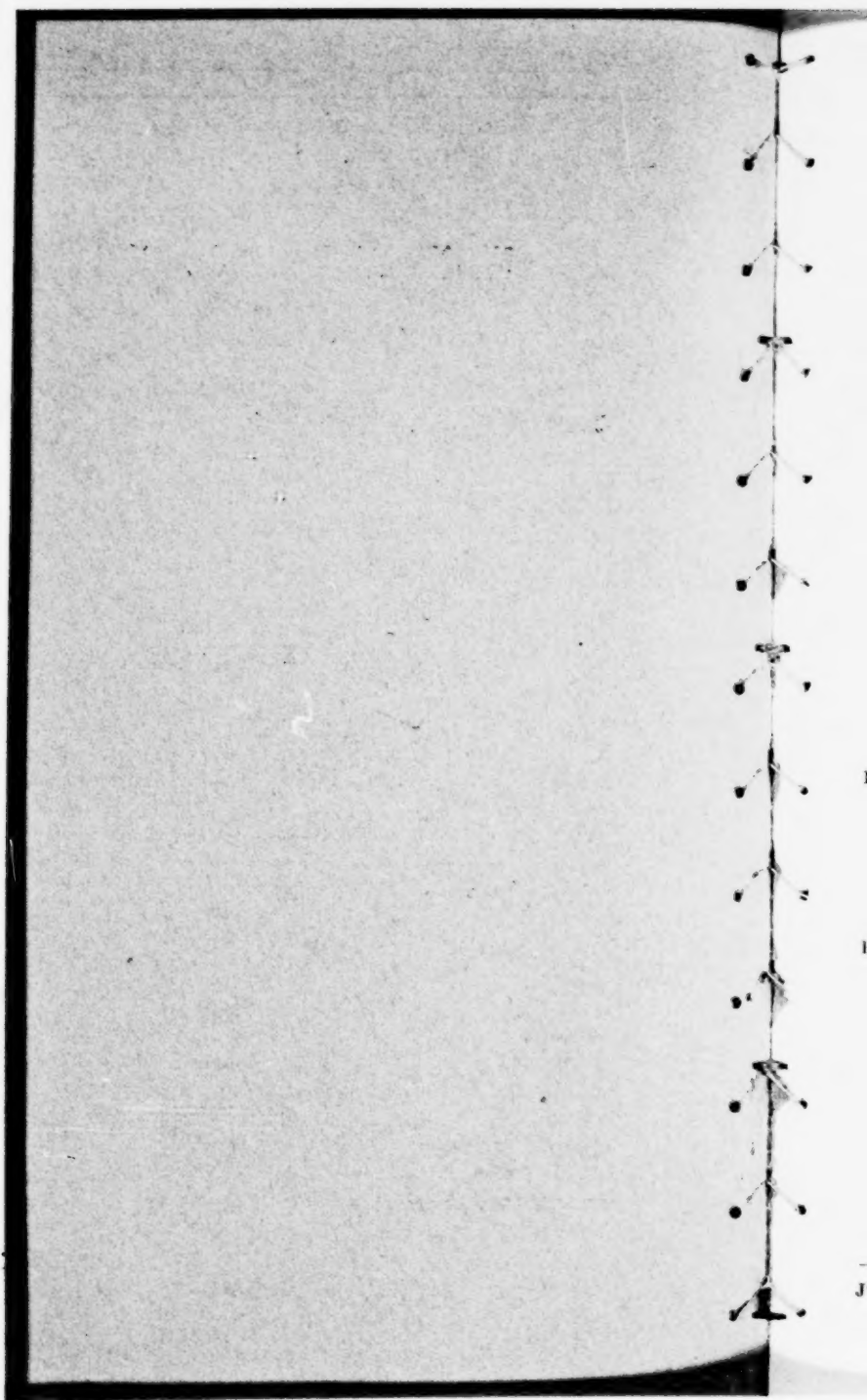
vs.

COUNTY OF WESTCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED AUGUST 3, 1921.

(28,403)



(28,403)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 448.

THE VALLEY FARMS COMPANY OF YONKERS,
PLAINTIFF IN ERROR,

vs.

COUNTY OF WESTCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals of the State of New York.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff-Appellant,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant-Respondent.

RECORD ON APPEAL.

Robert C. Beatty, Attorney for Plaintiff-Appellant, 68 William Street, Borough of Manhattan, New York City.

William A. Davidson, County Attorney, Attorney for Defendant-Respondent, County of Westchester, Court House, White Plains, N. Y.

William A. Walsh, Corporation Counsel, Attorney for Defendant, City of Yonkers, City Hall, Yonkers, N. Y.

1 New York Supreme Court, Appellate Division, Second
Department.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff-Respondent,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant-Appellant.

Statement under Rule 41.

This action was commenced by the service of a summons and complaint on January 11th, 1919, for the purpose of having cancelled an assessment upon plaintiff's property in the City of Yonkers, for the Bronx Valley Sewer.

By a special provision of law relating to said sewer, the County of Westchester is made a necessary party in actions where the validity of the tax or assessment imposed for said sewer is involved.

The defendant, City of Yonkers, served an answer to the complaint on March 12th, 1919, and the defendant, County of Westchester, interposed a demurrer which was served on the same day.

The issues raised by the demurrer were disposed of at a Special Term as the trial of an issue of law. A decision and interlocutory judgment overruling the demurrer were entered in the office of the Clerk of the County of Westchester on the 7th day of January, 1920, and the appeal is from such interlocutory judgment.

There has been no change of parties or attorneys.

Notice of Appeal from Interlocutory Judgment.

New York Supreme Court, County of Westchester.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff,
against

CITY OF YONKERS and COUNTY OF WESTCHESTER, Defendants.

SIRS:

You will please take notice that the defendant, County of Westchester, hereby appeals to the Appellate Division of the Supreme Court, Second Department, from the interlocutory judgment made and entered in the above-entitled action in the office of the Clerk of the County of Westchester on the 7th day of January, 1920, overruling the demurrer interposed by defendant, County of Westchester, to the complaint, and this appeal is taken from each and every part of said judgment.

Dated, White Plains, N. Y., January 30, 1920.

Yours, etc.,

WILLIAM A. DAVIDSON,
County Attorney, Attorney for Defendant,
County of Westchester.

Office and Post Office Address, Court House, White Plains, N. Y.

To:

Robert C. Beatty, Esq., Attorney for Plaintiff, 68 William Street, New York City.

William A. Walsh, Esq., Corporation Counsel, Attorney for Defendant, City of Yonkers, Yonkers, N. Y.

Louis N. Ellrodt, Esq., the Clerk of the County of Westchester.

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Summons.

[Same Title.]

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the attorney for the plaintiff, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, New York, January 9th, 1919.

ROBERT C. BEATTY,
Attorney for Plaintiff.

Office and Post Office Address, 68 William Street, Borough of Manhattan, New York City.

Complaint.

[Same Title.]

The plaintiff, for its complaint herein, by Robert C. Beatty, its attorney, alleges as follows:

First. That the plaintiff is now and at all the times hereinafter mentioned, was a domestic corporation organized and existing under the laws of the State of New York.

Second. That the defendant City of Yonkers is now and at all the times hereinafter mentioned, was a municipal corporation organized and existing under the laws of the State of New York.

Third. That the defendant County of Westchester is now and at all the times hereinafter mentioned, was a municipal corporation organized and existing under the laws of the State of New York.

Fourth. That the plaintiff is now and at all the times hereinafter mentioned was the owner in fee of certain property situated in the City of Yonkers and County of Westchester, State of New York, which said property is described upon the tax books of the City of Yonkers as hereinafter set forth, and assessed for the year 1918 at the valuations hereinafter set forth for the amounts of assessments hereinafter set forth for the Bronx Valley Sewer, said valuations being in all cases when the whole of said lot is within the area of assessment for the Bronx Valley Sewer identical in amount with the assessments on said properties for the year 1918 by the City of Yonkers for general taxation. The aforesaid descriptions, valuations and amounts are as follows:

Westchester County—City of Yonkers.

Assessment List, 1918.

In the Matter of Bronx Valley Sewer.

Fifth Ward.

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
1	371	Rumsey Road	\$400,000.00	\$113.84

(Valuation entire parcel for general taxation, including portion not assessed for sewer, \$47,800.)

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
1	370	Rumsey Road	34,200.00	97.33
1	450	Rumsey Road	32,500.00	92.49
2	296	Yonkers Avenue	1,000.00	2.84
2	302	Yonkers Avenue	500.00	1.42

Seventh Ward.

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
2	291	Rumsey Road	3,150.00	8.96

(Valuation entire parcel for general taxation, including portion not assessed for sewer, \$27,150.00.)

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
2	240	Rumsey Road	87,000.00	247.60

(Valuation entire parcel for general taxation, including portion not assessed for sewer, \$87,500.)

Eighth Ward.

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
3	160	Rumsey Road	56,500.00	160.79

(Valuation entire parcel for general taxation, including portion not assessed for sewer, \$60,000.)

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
3	101	Wendover Road	68,850.00	195.94

Ninth Ward.

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
47	21	Hayward Street	16,400.00	46.67
47	59	" "	72,900.00	207.47
53	162	Devoe Avenue	600.00	1.71
53	166	" "	600.00	1.71
53	170	" "	600.00	1.71
53	174	" "	600.00	1.71
53	178	" "	600.00	1.71
53	182	" "	600.00	1.71
54	149	" "	400.00	1.14
54	153	" "	400.00	1.14
54	157	" "	400.00	1.14
54	161	" "	400.00	1.14
54	165	" "	400.00	1.14
54	169	" "	400.00	1.14
54	173	" "	400.00	1.14
54	177	" "	400.00	1.14
54	181	" "	450.00	1.28

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
80	241	Lee Avenue	450.00	1.28
80	245	" "	450.00	1.28
80	249	" "	450.00	1.28
80	253	" "	450.00	1.28
80	265	" "	500.00	1.42
80	238	" "	500.00	1.42
80	246	" "	500.00	1.42
80	250	" "	500.00	1.42
80	254	" "	500.00	1.42
80	258	" "	500.00	1.42
80	262	" "	500.00	1.42
80	266	" "	550.00	1.56
109	Rear			
	492	McLean Avenue	53,400.00	151.97
144	174	Sedgwick Avenue	600.00	1.71
144	176	" "	300.00	.85
144	178	" "	400.00	1.14
8				
144	184	" "	300.00	.85
144	186	" "	300.00	.85
144	188	" "	300.00	.85
144	190	" "	300.00	.85
144	192	" "	300.00	.85
144	194	" "	300.00	.85
144	196	" "	300.00	.85
144	198	" "	300.00	.85
144	200	" "	300.00	.85
144	202	" "	300.00	.85
144	204	" "	300.00	.85
144	206	" "	300.00	.85
144	208	" "	300.00	.85
144	210	" "	250.00	.71
144	212	" "	250.00	.71
85	214	" "	250.00	.71
85	216	" "	250.00	.71
85	218	" "	250.00	.71
85	220	" "	250.00	.71
85	224	" "	250.00	.71
85	226	" "	250.00	.71
85	228	" "	250.00	.71
85	230	" "	250.00	.71
85	232	" "	250.00	.71
85	234	" "	250.00	.71
85	236	" "	250.00	.71
85	238	" "	250.00	.71
85	240	" "	250.00	.71
85	242	" "	250.00	.71

VALLEY FARMS CO., ETC., VS. CO. OF WESTCHESTER.

No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
244	Sedgwick Avenue	200.00	.57
246	" "	200.00	.57
248	" "	450.00	1.28
250	" "	400.00	1.14
252	" "	350.00	1.00
254	" "	350.00	1.00
256	" "	350.00	1.00
258	" "	350.00	1.00
260	" "	300.00	.85
262	" "	450.00	1.28
266	" "	300.00	.85
268	" "	250.00	.71
270	" "	250.00	.71
272	" "	250.00	.71
274	" "	250.00	.71
276	" "	250.00	.71
278	" "	250.00	.71
280	" "	250.00	.71
282	" "	200.00	.57
284	" "	200.00	.57
286	" "	200.00	.57
288	" "	200.00	.57
290	" "	200.00	.57
292	" "	200.00	.57
294	" "	200.00	.57
296	" "	200.00	.57
298	" "	200.00	.57
300	" "	350.00	1.00
155	" "	600.00	1.71
163	" "	250.00	.71
165	" "	250.00	.71
167	" "	250.00	.71
169	" "	250.00	.71
171	" "	250.00	.71
173	" "	250.00	.71
175	" "	250.00	.71
177	" "	250.00	.71
179	" "	250.00	.71
181	" "	250.00	.71
183	" "	250.00	.71
185	" "	250.00	.71
187	" "	250.00	.71
189	" "	250.00	.71
199	" "	250.00	.71
201	" "	220.00	.62

VALLEY FARMS CO., ETC., VS. CO. OF WESTCHESTER.

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Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot
137	203	Sedgwick Avenue	250.00	.71
143	205	" "	250.00	.71
143	207	" "	250.00	.71
143	209	" "	250.00	.71
143	211	" "	250.00	.71
143	213	" "	250.00	.71
143	215	" "	250.00	.71
143	217	" "	250.00	.71
143	219	" "	250.00	.71
143	221	" "	250.00	.71
143	223	" "	250.00	.71
143	225	" "	250.00	.71
143	227	" "	250.00	.71
143	229	" "	250.00	.71
143	231	" "	250.00	.71
143	233	" "	250.00	.71
143	235	" "	250.00	.71
143	237	" "	250.00	.71
143	239	" "	250.00	.71
143	241	" "	250.00	.71
143	243	" "	250.00	.71
143	245	" "	250.00	.71
143	247	" "	250.00	.71
143	249	" "	250.00	.71
143	251	" "	250.00	.71
143	253	" "	250.00	.71
143	255	" "	250.00	.71
143	257	" "	250.00	.71
143	259	" "	250.00	.71
143	261	" "	250.00	.71
143	263	" "	250.00	.71
143	265	" "	300.00	.85
143	267	" "	300.00	.85
143	269	" "	200.00	.57
11				
143	271	" "	200.00	.57
143	273	" "	200.00	.57
143	275	" "	200.00	.57
144	277	" "	200.00	.57
144	279	" "	200.00	.57
144	281	" "	200.00	.57
98	141	Wendover Road	132,000.00	375.66
98	190	" "	150.00	.43
98	192	" "	150.00	.43
98	194	" "	150.00	.43
98	196	" "	150.00	.43
98	198	" "	150.00	.43
98	200	" "	200.00	.57

VALLEY FARMS CO., ETC., VS. CO. OF WESTCHESTER.

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
98	202	Wendover Road	200.00	.57
98	204	" "	200.00	.57
98	206	" "	200.00	.57
98	208	" "	200.00	.57
98	210	" "	225.00	.64
98	212	" "	225.00	.64
98	214	" "	200.00	.57
98	216	" "	200.00	.57
98	218	" "	200.00	.57
98	Rear			
	253	Yonkers Avenue	11,250.00	32.01
111	211	Midland Avenue	1,000.00	2.84
111	233	" "	2,700.00	7.68
111	255	" "	2,500.00	7.11
111	299	" "	400.00	1.14
112	240	" "	160,750.00	457.48
112	244	" "	69,500.00	197.79
112	280	" "	9,000.00	25.61
112	300	" "	47,500.00	135.18
117	149	Kneeland Avenue	300.00	.85
117	153	" "	300.00	.85
117	157	" "	350.00	1.00
117	161	" "	350.00	1.00
12				
117	165	" "	350.00	1.00
117	169	" "	350.00	1.00
117	173	" "	350.00	1.00
117	177	" "	350.00	1.00
117	181	" "	450.00	1.28
87	140	Valentine Street	40,900.00	116.40
74	35	Jervis Road	250.00	.71
74	37	" "	250.00	.71
74	39	" "	300.00	.85
74	41	" "	300.00	.85
74	43	" "	300.00	.85
74	49	" "	300.00	.85
74	51	" "	300.00	.85
74	53	" "	300.00	.85
74	55	" "	300.00	.85
74	57	" "	300.00	.85
74	59	" "	300.00	.85
74	61	" "	250.00	.71
74	63	" "	250.00	.71
74	65	" "	250.00	.71
74	67	" "	250.00	.71
74	69	" "	250.00	.71
74	71	" "	250.00	.71

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
74	73	Jervis Road	250.00	.71
74	75	" "	250.00	.71
74	77	" "	250.00	.71
74	79	" "	250.00	.71
74	81	" "	250.00	.71
74	83	" "	250.00	.71
74	85	" "	250.00	.71
74	87	" "	250.00	.71
74	89	" "	250.00	.71
74	91	" "	200.00	.57
74	93	" "	200.00	.57
74	95	" "	250.00	.71
74	97	" "	250.00	.71
13				
73	52	" "	250.00	.71
73	54	" "	250.00	.71
73	56	" "	250.00	.71
73	58	" "	250.00	.71
73	60	" "	250.00	.71
73	62	" "	250.00	.71
73	64	" "	250.00	.71
73	88	" "	250.00	.71
73	90	" "	250.00	.71
73	92	" "	250.00	.71
73	94	" "	200.00	.57
73	106	" " (Reserved)	200.00	.57
73	108	" "	200.00	.57
73	110	" "	200.00	.57
73	112	" "	250.00	.71
73	114	" "	250.00	.71
73	116	" "	250.00	.71
74	118	" "	400.00	1.14
57	A	Gardner Place (from 15)	2,500.00	7.26
57	C	" "	2,550.00	7.26
137	138	Tibbets Road	450.00	1.28
137	150	" "	300.00	.85
137	152	" "	300.00	.85
137	154	" "	300.00	.85
137	156	" "	300.00	.85
137	158	" "	300.00	.85
137	174	" "	250.00	.71
137	176	" "	250.00	.71
137	178	" "	240.00	.68
137	180	" "	350.00	1.00
137	182	" "	350.00	1.00
137	184	" "	350.00	1.00

Page.	No. of lot on city map.	Name of street.	Valuation of real estate.	Amount of assessment on each lot.
137	186	Tibbetts Road	350.00	1.00
138	192	" "	350.00	1.00
138	194	" "	350.00	1.00
138	196	" "	350.00	1.00
14				
138	198	" "	350.00	1.00
138	200	" "	350.00	1.00
138	202	" "	350.00	1.00
138	204	" "	350.00	1.00
138	206	" "	300.00	.85
138	208	" "	300.00	.85
138	210	" "	300.00	.85
138	212	" "	300.00	.85
138	214	" "	300.00	.85
138	216	" "	300.00	.85
138	218	" "	300.00	.85
138	220	" "	300.00	.85
138	222	" "	250.00	.71
138	224	" "	250.00	.71
138	226	" "	250.00	.71
138	228	" "	250.00	.71
138	230	" "	250.00	.71
138	232	" "	250.00	.71
138	234	" "	250.00	.71
138	236	" "	250.00	.71
138	242	" "	250.00	.71
138	244	" "	200.00	.57
138	246	" "	200.00	.57
138	248	" "	200.00	.57
138	250	" "	200.00	.57
138	252	" "	200.00	.57
138	254	" "	200.00	.57
138	256	" "	200.00	.57

Tenth Ward.

311	253	Yonkers Avenue	300,000.00	853.78
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(Valuation entire parcel for general taxation, including portion not assessed for sewer, \$335,700.)

15 Fifth. That the plaintiff is engaged in the business of developing for the purposes of sale, its said real estate located in the City of Yonkers, and that the plaintiff sells homesites, plots and lots.

Sixth. That by virtue of Chapter 646 of the Laws of 1905 of the State of New York, entitled "An Act to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the County of Westchester, and to provide means for the payment therefor," as amended by Chapter 747 of the Laws of 1907, Chapter 96 of the Laws of 1909, Chapters 361 and 869 of the Laws of 1911, Chapter 550 of the Laws of 1912, Chapter 417 of the Laws of 1913, Chapter 487 of the Laws of 1914, Chapters 425 and 655 of the Laws of 1915, Chapters 44 and 245 of the Laws of 1916, Chapter 646 of the Laws of 1917 and Chapters 82 and 535 of the Laws of 1918, the Legislature of the State of New York attempted to fix and determine by a description in said amendments the area benefited by said sanitary trunk sewer and sanitary outlet sewer and to provide for assessments upon all the property situated within the said area fixed by the Legislature of the State of New York and which area included all the above described property of the plaintiff.

Seventh. The said sanitary trunk sewer and the said sanitary outlet sewer are located wholly in the County of Westchester. The said sanitary trunk sewer is a continuous single line of trunk sewer commencing at the northerly line of the City of White
16 Plains at or near the Bronx River and running thence in a general southerly direction along or near the course of the Bronx River in or through the towns of Greenburgh, Scarsdale, Eastchester, and the cities of White Plains, Mount Vernon and Yonkers, to or near the southerly line of the City of Yonkers, which is also the southerly line of Westchester County. The said sanitary outlet sewer connects with the said sanitary trunk sewer at the southerly end of such sanitary trunk sewer near the southerly line of the City of Yonkers and runs thence westerly through the City of Yonkers near the southerly line of said city, into the Hudson River. Such sanitary outlet sewer is a single continuous line of sewer excepting for a distance of six hundred and thirty-four (634) feet where it is a double line. It consists of a sewer tunnel throughout most of its length as it passes under two high ridges of land. It is only for a short distance in the Tibbetts Valley that it is near the surface.

Eighth. The said sanitary trunk sewer is divided into five (5) sections, each of which includes the manholes and appurtenances at its lower end. These sections are located as follows:

Section I. From including the manhole at Station 622+24.72 on Fisher Street, North White Plains, to the manhole at Station 479+11.86 just north of the sewer and railroad crossing south of White Plains.

Section II. From the manhole last named to the manhole at Station 350+99.51 in the stone road opposite Scarsdale Depot.

17 Section III. From the manhole last named to the manhole at Station 235+55.39 at Yonkers Parkway opposite Yonkers Park Depot.

Section IV. From the manhole last named to the manhole at Station 106+06.16 in Bronxville Road or Fleetwood Avenue, south of Bronxville.

Section V. From the manhole last named to the manhole at Station 2+85 at Wakefield Avenue, opposite Wakefield Depot.

The length of the said Section I of said sanitary trunk sewer is approximately 14,133.37 feet, consisting of a concrete sewer of a diameter of 3 feet 4 inches, increasing to 3 feet 9 inches and 4 feet, and 4 feet 3 inches.

The length of the said Section II of said sanitary trunk sewer is approximately 12,759.13 feet consisting of a concrete sewer of a diameter of 4 feet 3 inches, increasing to 4 feet 6 inches and 5 feet 3 inches.

The length of the said Section III of said sanitary trunk sewer is approximately 11,502.53 feet, consisting of a concrete sewer of a diameter of 3 feet 8 inches, increasing to 4 feet 3 inches and 4 feet 4 inches and 4 feet 9 inches.

The length of the said Section IV of said sanitary trunk sewer is approximately 13,304.47 feet, consisting of a concrete sewer of a diameter of 4 feet 6 inches, increasing to 4 feet 9 inches and 5 feet and 5 feet 3 inches and 6 feet.

The length of the said Section V of said sanitary trunk sewer is approximately 10,321.16 feet, consisting of a concrete sewer of a diameter of 6 feet.

18 The said sanitary trunk sewer consisting of said five sections as above described, forms a single continuous line of sanitary trunk sewer in general increasing in diameter as it runs down grade from its northerly end to its southerly end, but in places diminishing in diameter because of the increased down grade in such parts, rendering a smaller sewer sufficient in those parts for use in connection with the larger sewer where the downward grade is considerably less.

The said sanitary outlet sewer is divided into two (2) additional sections. These sections are located as follows:

Section VI. From the aforesaid manhole in Wakefield Avenue southerly and westerly to the reducer in the valley of Tibbets Brook, being the western extremity of the six and one-half (6½) foot section at Tunnel Station 73+52.28.

Section VII. From and including the said reducer and connection with said extremity, westerly to and including the Hudson Outfall.

The length of the said Section VI of said sanitary outlet sewer is approximately 7,960.22 feet, consisting of a concrete sewer or sewer tunnel of a diameter of 6 feet, increasing to 6 feet 6 inches and through and including two drop manholes.

The length of the said Section VII of said sanitary outlet sewer is approximately 7,968.28 feet, of which distance 634 feet is a double line of cast iron pipe of a diameter of 4 feet, including two (2) 36-inch Ts, the remainder of said Section VII consists of a concrete

sewer or sewer tunnel of a diameter of 8 feet 6 inches with the exception of the sewer at Tibbetts Crossing, which is rectangular in shape and 5 feet by 7 feet 9 inches.

The aggregate length of the said sanitary trunk sewer, composed of the said five sections as above described, is approximately 62,020.66 feet, or a trifle less than eleven and three-quarter miles in length. The aggregate length of the said sanitary outlet sewer, composed of the said two sections as above described, is approximately 15,928.50 feet, or a trifle over three miles in length.

The total length of the said sanitary trunk sewer and the said sanitary outlet sewer is approximately 77,949.16 feet, or a trifle less than fourteen and three-quarter miles.

Ninth. The said sanitary trunk sewer and the said sanitary outlet sewer is limited in its use to house drainage only, there being no drainage connections provided for surface water. Previously existing drainage systems for the drainage of street gutters and surface water generally, have been continued independently of such sanitary trunk sewer and such sanitary outlet sewer, and none of such surface water drains into such sanitary trunk sewer or sanitary outlet sewer. The grade of such sanitary trunk sewer is continuously down grade from the northerly end thereof to its southerly end, where it joins the said sanitary outlet sewer and the grade of such sanitary outlet sewer is continuously down grade from that point to the Hudson River Outfall, its terminus, where it drains into the Hudson River. There are no pumping stations and sewerage flows throughout said sanitary trunk sewer and said sanitary outlet sewer by gravity only.

Tenth. The topography of that part of Westchester County through which said sanitary trunk sewer and said sanitary outlet sewer run, together with the lands contiguous thereto, is briefly as follows: Westchester County is bounded on the west by the Hudson River. Its southerly end is a line running approximately east from the Hudson River. To the south of the southerly boundary line of Westchester County and situated some distance therefrom, is the Harlem River, running from the Hudson River easterly and southerly into the East River. Said Harlem River bounds Manhattan Island on the north and northeast and said East River bounds Manhattan Island on the east. The Harlem River is the only large watercourse situated to the south of Westchester County. Rising sharply from the Hudson River to the east in Westchester County, a high ridge of land runs close to such river north and south and approximately parallel to the Hudson River. Easterly from such ridge the land slopes down into a valley called at its southerly end Tibbetts Valley. Easterly from Tibbetts Valley the land rises sharply to another ridge running north and south and approximately parallel to the first ridge above described. Easterly from such second ridge the land slopes down to the Bronx Valley through which a small watercourse called the Bronx River flows in a southerly direction into the East River. Easterly from the Bronx Valley there is a third ridge running also approximately north and south,

The lands on the east side of the third ridge drain in a southerly and southeasterly direction into Long Island Sound, which
21 lies easterly from the point of connection of the East River with Long Island Sound. The natural drainage of the Bronx Valley between said second and third ridges, is southerly into the East River, into which the Bronx River running through the Bronx Valley empties. The natural drainage of the Tibbetts Valley is in a southerly direction into the Harlem River into which Tibbetts Brook, which runs through Tibbetts Valley, empties at a point easterly and not far distant from the point of connection between the Harlem River and the Hudson River.

Eleventh. There is no natural drainage connection between the Bronx Valley and the Tibbetts Valley, such valleys being separated along their entire lengths by the second ridge above described.

Twelfth. The said sanitary outlet sewer is necessary for the use of the said sanitary trunk sewer as it is the only outlet for that sewer. Such sanitary outlet sewer runs from the point of connection with said sanitary trunk sewer westerly under the second ridge above described and at a great depth below the surface of such ridge, too deep for any sewer connections to be made west of the point where the said sanitary trunk sewer connects with the said sanitary outlet sewer, until the latter reaches the Tibbetts Valley. It continues to run westerly toward the Hudson River across Tibbetts Valley and under the first ridge above described and at a great depth below the surface of such ridge, to the point where it terminates and empties into the
22 Hudson River. It is only in Tibbetts Valley that any sewer connections for the Tibbetts Valley water-shed or drainage area, can be made to this sanitary outlet sewer.

Thirteenth. There can be no sewer connections made for the property situated in Tibbetts Valley to the said sanitary trunk sewer which runs as before stated, through the Bronx Valley, both because such lands in Tibbetts Valley are separated from said sanitary trunk sewer by the second ridge above described, which rises from 200 to 250 feet above the level of Tibbetts Brook running through the Tibbetts Valley, and because the grade of said sanitary outlet sewer and said sanitary trunk sewer rises from Tibbetts Valley all the way to the northerly end of such sanitary trunk sewer in North White Plains.

Fourteenth. The only use that can be made for property situated in Tibbetts Valley of the said sanitary outlet sewer is by the connection of a trunk sewer about four miles in length, which has not yet been built, to connect with the said sanitary outlet sewer at or near the easterly end of Section VII of said sanitary outlet sewer; and the Lincoln Park section of Tibbetts Valley, which is the southeasterly part of said valley, has a trunk sewer already connected to Section VI of said sanitary outlet sewer at a point about 300 feet easterly from the lower end of said Section VI, and that distance easterly from the connection of said Section VII. The property in Tibbetts Valley which can use such sewer connection is only about

2,500 acres in extent. Thus, the only part of said sanitary outlet sewer that could be used for sewer purposes by the property in Tibbetts Valley is a partial use of Section VII, approximately 7,968.28 feet long, and a partial use of the additional 300 feet at the end of Section VI for the Lincoln Park section of Tibbetts Valley only. Such partial use is only for a trifle over one and a half miles of such sanitary outlet sewer out of three miles of such sanitary outlet sewer, and the part that cannot be used for said Tibbetts Valley property is all of said sanitary trunk sewer, a trifle less than eleven and three-quarter miles in length, and the said mile and a half additional of said sanitary outlet sewer.

The partial use that can be made of such part of the said sanitary outlet sewer is, in addition to its use as the outlet sewer for the whole of said sanitary trunk sewer, eleven and three-quarter miles in length, running through a populous section of Westchester County and designed for and used as the drainage system of the greater part of the said Bronx Valley.

Fifteenth. No trunk sewer has been built to drain the Tibbetts Valley property excepting only a small part thereof situated in the said Lincoln Park section of Tibbetts Valley. To construct such a trunk sewer in Tibbetts Valley would cost upwards of three hundred thousand dollars (\$300,000). The property situated in Bronx Valley has thus a completed trunk sewer to which service sewers may be directly connected, while the property in Tibbetts Valley (with the exception only of the said Lincoln Park section) has no trunk sewer whatsoever, and can make no use whatsoever of any part of such sanitary outlet sewer until such a trunk sewer is constructed.

Sixteenth. Notwithstanding the partial use that only can be made for property in Tibbetts Valley of a small part of such sanitary outlet sewer and no part of such sanitary trunk sewer, all of the property in Tibbetts Valley is assessed for the whole cost of both said sanitary outlet sewer and said sanitary trunk sewer, fourteen and three-quarter miles in length, at the same rate as the property in Bronx Valley, without any distinction or difference whatsoever.

Seventeenth. The said assessments for the expense of constructing and maintaining said sanitary trunk sewer and said sanitary outlet sewer are required by said act as amended, to be and are based wholly upon the assessed valuations for purposes of general taxation upon the property within the assessment area described in the said act as amended. There is no power conferred by said act as amended to reduce such assessments upon property in any part of such assessment area which is not equally benefited with property in any other part of such assessment area. Each property throughout said assessment area is assessed at its assessed value for purposes of general taxation, irrespective of the degree of benefit derived from the construction of the said sanitary trunk sewer and said sanitary outlet sewer.

Eighteenth. The said act as amended fixes the area of assessment by an amendment in the year 1917, twelve years after the
25 passage of the original act and five years after the completion of said sanitary trunk sewer and sanitary outlet sewer which took place in the year 1913. The original act contained two fundamental provisions. One limited the total cost to \$2,000,000 and provided that "no contracts shall be awarded for one section of this sewer until estimates have been received for all sections, so that in no event the limit fixed by this act as to the cost of the total work shall be exceeded." The other provided for the fixing of the area to be benefited by the Commissioners appointed under said act, and that "the Commissioners shall fix a time and place within the County of Westchester, when all property owners shall have an opportunity to be heard as to the plans submitted and the area benefited," and that "contracts shall not be let nor shall work be begun under the said final map or plan" (adopted after such hearing) "until such final map or plan shall have been approved by the State Engineer and the State Department of Health." Both of these fundamental provisions of the original act were changed by the amendments thereto, so that the total cost is in excess of \$3,250,000, and the area of benefit is fixed by description in amendments to the original act and the property owners deprived of any notice or hearing as to whether their property was properly included in such area of benefit.

Nineteenth. The assessments for said sanitary trunk sewer and sanitary outlet sewer are upon the valuations of the property situated within said area of assessment for purposes of general taxation
26 tion and improved property is assessed at the said value of the land with the improvements thereon, so that such assessments are entirely disproportionate to the benefits upon adjoining properties that can make the same use of such sewer, depending entirely upon whether one property has a building on it and the other property is vacant, and depending further upon the values of the particular buildings upon such lots.

Twentieth. That said act as amended and purports to require the Board of Supervisors of the County of Westchester, in each calendar year, to adopt a budget for the Bronx Valley sanitary sewer district and to determine the aggregate amount of the tax to be collected for such district for such year, and in such budget to include certain items specified in such act which are unconstitutional and unlawful and a deprivation of the plaintiff's property without due process of law, including the cost of all litigation now or hereafter incurred, and to provide a contingent fund to meet deficiencies in revenues which requires persons who have paid the amounts assessed against their properties to pay further sums to make up deficiencies arising from the non-payment of such assessments by owners of other property situated in said district. That the sum assessed against the plaintiff's said property for said year 1918 includes such unconstitutional and unlawful items.

Twenty-first. That said act as amended purports to provide that in the City of Mount Vernon the assessments for the Bronx
 27 Valley Sewer shall not be levied or assessed against the lots or parcels of land situate within such Bronx Valley sanitary sewer district, but that the aggregate amount of such tax shall be levied and assessed upon all the property, real and personal, liable to general taxation within said city and not exempt therefrom and thereby this plaintiff is denied the equal protection of the laws and an unconstitutional and illegal discrimination is made against the plaintiff's said property. The area of the said Bronx Valley sewer district within the City of Mount Vernon is only a small part of the area of the lands within said city.

Twenty-second. That the plaintiff has been illegally assessed upon the said property above described in the sums above set forth for the year 1918. The said illegality forms no part of the record and can be established only by extrinsic evidence.

Twenty-third. That the said act as amended, which included all of the plaintiff's said property in the area for assessments provided therein, is in violation of the Fourteenth Amendment of the Constitution of the United States of America and is in violation of Section 6 of Article I of the Constitution of the State of New York in that it deprives plaintiff of its property without due process of law and without just compensation and denies to it the equal protection of the law.

Twenty-fourth. The said assessments are a cloud upon the title to plaintiff's said property and greatly depreciates the market
 28 value thereof and interferes with the sale of said property, and the plaintiff has no adequate remedy at law.

Wherefore, plaintiff demands judgment that all of the said assessments against the plaintiff's said property be adjudged void and cancelled of record and that the City of Yonkers, its officers, agents and servants, be restrained from collecting such assessments, and for such other and further relief in the premises as may be just and equitable together with the costs and disbursements of this action.

ROBERT C. BEATTY,

Attorney for Plaintiff.

Office and Post Office Address, 68 William Street, Borough of Manhattan, New York City.

STATE OF NEW YORK.

County of New York, ss:

Alexander Stolz, being duly sworn, says: that he is the secretary and treasurer of The Valley Farms Company of Yonkers, the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged

upon information and belief, and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is not made by the plaintiff, is that it is a domestic corporation; that all the material allegations of the complaint are within the knowledge of deponent, he having charge of the property of the company and in connection therewith kept informed of all charges and attempted charges for taxes and assessments thereon, and in looking after all the details affecting the said property.

ALEXANDER STOLZ.

Sworn to before me this 9th day of January, 1919.

WM. H. KEOGH,

New York County No. 60.

Notary Public.

New York Register No. 10140.

Demurrer.

[Same Title.]

The defendant County of Westchester, by William A. Davidson, County Attorney of the County of Westchester, its attorney, demurs to the complaint herein upon the ground that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action.

WILLIAM A. DAVIDSON,
*County Attorney of Westchester County,
Attorney for Defendant County of Westchester.*

Office and Post Office Address, Court House, White Plains, N. Y.

Decision.

[Same Title.]

The issue of law raised by the demurrer of the defendant, County of Westchester, to the complaint (The City of Yonkers having answered), coming on to be heard by the Court at a Special Term thereof, held by the undersigned at the County Court House in the City of White Plains, County of Westchester, and after hearing William A. Davidson, Esq., attorney and counsel for the defendant County of Westchester, in support of the demurrer, and Robert C. Beatty, Esq., attorney and counsel for the plaintiff in opposition thereto, and due deliberation having been had thereon, I decide and find as follows:

Conclusions of law:

I. That the said complaint states facts sufficient to constitute a cause of action.

II. That the plaintiff is entitled to an interlocutory judgment overruling said demurrer with \$10 costs, but with leave to the defendant County of Westchester to plead anew upon payment of

said \$10 costs, within twenty days after due service of said judgment with notice of entry thereof upon the attorney for the defendant County of Westchester, and in default thereof, plaintiff is entitled to a final judgment as against the said defendant County of Westchester, for the relief demanded in the complaint.

III. Judgment is hereby directed accordingly.

Dated January 6, 1920.

A. S. TOMPKINS,
J. S. C.

31

Interlocutory Judgment.

[Same Title.]

This cause having been regularly brought on for trial upon the issues of law formed by the plaintiff's complaint, and the demurrer of the defendant County of Westchester thereto, at a Special Term of the Supreme Court, County of Westchester, held at the County Court House in the City of White Plains, County of Westchester, before Hon. Arthur S. Tompkins, one of the justices of said Court, on the 9th day of October, 1919 (the City of Yonkers having answered), and said Court having heard William A. Davidson, Esq., attorney and counsel for defendant County of Westchester, and Robert C. Beatty, Esq., attorney and counsel for plaintiff, and, having after due deliberation, duly made and filed its decision directing an interlocutory judgment to be entered herein, overruling said demurrer, with \$10 costs, with leave to the defendant County of Westchester to plead anew on payment of said costs within 20 days;

Now, on motion of Robert C. Beatty, attorney for plaintiff, it is Ordered and adjudged, that the demurrer of the defendant County of Westchester to the complaint herein be overruled with \$10 costs, with leave to said defendant County of Westchester to plead anew upon payment of said costs within twenty days after due service of a copy of this interlocutory judgment, with notice of entry, upon the attorney for the defendant County of Westchester, and in default thereof the plaintiff shall have final judgment as against the defendant County of Westchester herein for the relief demanded in the complaint.

32

Judgment entered January 7, 1920.

LOUIS N. ELLRODT,
Clerk.

Opinion.

[Same Title.]

TOMPKINS, J.:

If the allegations of fact contained in Paragraphs 13, 14, 15, 16 and 19 of the complaint are true, there may be serious doubt as to the legality of the assessments against the plaintiff's property. These facts are necessarily admitted by the defendant's demurrer. There-

fore, I think that the demurrer should be overruled and the questions of law reserved until after the facts are settled.

Demurrer overruled, with leave to the defendant to answer within 20 days upon payment of \$10 costs.

Dated, Nyack, N. Y., December 16th, 1919.

Stipulation Waiving Certification.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby consented and stipulated by and between the attorneys for the respective parties herein that the foregoing printed papers constitute the record on appeal herein and are true and correct copies of the notice of appeal herein, of the judgment roll entered in the office of the Clerk of the County of Westchester on the 7th day of January, 1920, upon the interlocutory judgment overruling the demurrer of the defendant County of Westchester to the complaint herein and all of the papers and proceedings used in the Court below, upon the hearing of the demurrer and now on file in the office of the Clerk of the County of Westchester, and certification thereof, pursuant to Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, January 30, 1920.

WILLIAM A. DAVIDSON,
County Attorney,
Attorney for Defendant County of Westchester.
WILLIAM A. WALSH,
Corporation Counsel,
Attorney for Defendant City of Yonkers.
ROBERT C. BEATTY,
Attorney for Plaintiff.

Order of Appellate Division.

At a Term of the Appellate Division of the Supreme Court Held in and for the Second Judicial Department, at the Borough of Brooklyn, on the 8th Day of October, 1920.

Present: Hon. Almet F. Jenks,
Presiding Justice.
Present: Hon. Isaac N. Mills,
Present: Hon. Harrington Putnam,
Present: Hon. Abel E. Blackmar,
Present: Hon. William J. Kelly,
Justices.

THE VALLEY FARMS COMPANY OF YONKERS, Respondent,

vs.

CITY OF YONKERS, Defendant;

COUNTY OF WESTCHESTER, Appellant.

(Order of Reversal on Appeal from Judgment.)

The above named County of Westchester, one of the defendants in this action having appealed to the Appellate Division of the Supreme Court from an interlocutory Judgment of the Supreme Court entered in the office of the Clerk of the County of Westchester on the 7th day of January, 1920, and the said appeal having
35 been argued by Mr. Wm. A. Davidson, of counsel for the appellant, and by Mr. Robert C. Beatty, of counsel for the respondent, and due deliberation having been had thereon,

It is hereby ordered and adjudged that the interlocutory judgment so appealed from be and the same is hereby reversed, with costs, and judgment granted sustaining the demurrer, and dismissing the complaint, with costs.

Enter,

ALMET F. JENKS,
Presiding Justice.

Judgment Appealed From.

Supreme Court, Westchester County.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff,

against

THE CITY OF YONKERS and COUNTY OF WESTCHESTER, Defendants.

The defendant, the County of Westchester, having appealed to the Appellate Division, Second Department, from an interlocutory judgment overruling the demurrer of the defendant the
36 County of Westchester, to the complaint herein, and the order of the Appellate Court, as resettled by that Court, reversing such interlocutory judgment and directing judgment, sustaining the demurrer, and dismissing the complaint, with costs, having been duly entered,

Now on motion of William A. Davidson, attorney for defendant, the County of Westchester, it is

Ordered and adjudged, that the interlocutory judgment so appealed from as aforesaid, be and the same is hereby reversed with costs; and it is further

Ordered and adjudged, that the demurrer of the defendant, the County of Westchester, to the complaint be sustained and the complaint dismissed with costs.

February 8, 1921.

LOUIS N. ELLRODT,
Clerk.

37

Notice of Appeal to the Court of Appeals.

New York Supreme Court, County of Westchester.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff-Appellant,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant-Respondent.

SIRS:

Please take notice that the plaintiff, The Valley Farms Company of Yonkers, hereby appeals to the Court of Appeals from the final judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered pursuant to an order of the said Appellate Division, dated October 8, 1920, in the office of the Clerk of the County of Westchester on the eighth day of February, 1921, which reverses an interlocutory judgment of the Supreme Court overruling the demurrer interposed by defendant County of Westchester, and entered in said Clerk's office on the seventh day of January, 1920, and which judgment of the said Appellate Division

sustains the demurrer of the defendant County of Westchester, and dismisses the complaint herein, and the plaintiff appeals from each and every part of such judgment.

Dated, New York, February 9, 1921.

Yours, etc.,

ROBERT C. BEATTY,
Attorney for Plaintiff-Appellant.

68 William Street, New York City.

To

William A. Davidson, Esq., County Attorney, Attorney for Defendant-Respondent, County of Westchester, County Court House, White Plains, N. Y.

William A. Walsh, Esq., Corporation Counsel, Attorney for Defendant, City of Yonkers, Yonkers, N. Y.

Louis N. Ellrodt, Esq., Clerk of the County of Westchester.

39

Undertaking on Appeal.

Supreme Court, Westchester County.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff-Appellant,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant and Respondent.

Whereas, the above named, the Valley Farms Company of Yonkers, plaintiff and appellant, has appealed or intends to appeal to the Court of Appeals from the final judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered pursuant to an order of the said Appellate Division, dated October 8, 1920, in the office of the Clerk of the County of Westchester on the eighth day of February, 1921, which reverses an interlocutory judgment of the Supreme Court overruling the demurrer interposed by defendant County of Westchester, and entered in said Clerk's office on the seventh day of January, 1920, and which judgment of the said Appellate Division sustains the demurrer of the defendant

County of Westchester, and dismisses the complaint herein,
40 and the plaintiff appeals from each and every part of such judgment.

Now, therefore, the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 47 Cedar Street, in the City of New York, does hereby, pursuant to the statute in such cases made and provided, undertake that the appellant, the Valley Farms Company of Yonkers, will pay all costs and damages which may be awarded against the appellant, the Valley Farms Company of Yonkers, on said appeal, not exceeding five hundred (\$500.00) dollars.

Dated, New York, February 10th, 1921

UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By S. FRANK HEDGES,

Attorney-in-fact.

Attest:

WILLIAM H. ESTWICK,

Attorney-in-fact.

STATE OF NEW YORK,

County of New York, ss:

On the 10th day of February, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is attorney-in-fact of the United States Fidelity and Guaranty
41 Company, the corporation described in and which executed the within instrument; that he knew the seal of said corpora-

tion, that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he was acquainted with William H. Estwick and knew him to be the attorney-in-fact of said company; that the signature of said William H. Estwick, subscribed to the within instrument, is in the genuine handwriting of said William H. Estwick, was subscribed thereto by like order of said Board of Directors, and in the presence of him the said S. Frank Hedges.

AUGUSTUS WALLAUER,
Notary Public.

Queens County No. 1988.

Certificate filed in New York County No. 868. Register's No. 1876. Richmond, Westchester, Nassau, Putnam, Orange, Suffolk and Rockland Counties.

Term expires March 30, 1921.

At a special meeting of the Board of Directors of the United
42 States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 16th day of May, A. D. 1919, the following resolution was unanimously adopted:

Resolved, That Alonzo Gore Oakley, or John F. Plummer, or Adolphus A. Jackson, or William H. Estwick, or Gilman Ashburner, or A. Van Tambacht, or J. Frank Supplee, or E. G. Babcock, or George A. Reading, or C. D. Marsac, or S. Frank Hedges, or Frederic S. Cone, Attorneys-in-fact of this Company in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions of proceedings or by law required, including co-suretyship and reinsurance agreements, and all other bonds, undertakings or guarantees of whatsoever nature not specifically covered by the foregoing authority; such bonds, undertakings and agreements, however, to be attested in every instance by one other of the persons above named, as occasion may require, provided that if such bonds, undertakings and agreements are not executed by either Alonzo Gore Oakley, or John F. Plummer, or Adolphus A. Jackson, or William H. Estwick then and in such event said bonds, undertakings and

agreements shall be attested by either the said Alonzo Gore
 43 Oakley, or John F. Plummer, or Adolphus A. Jackson, or
 William H. Estwick; and the aforesaid Attorneys-in-fact are,
 and each of them is hereby authorized and empowered to certify a
 copy of this resolution under the seal of this Company.

STATE OF NEW YORK.

County of New York, ss:

I, S. Frank Hedges, attorney-in-fact of the United States Fidelity
 and Guaranty Company, have compared the foregoing resolution
 with the original thereof, as recorded in the minute book of the said
 Company, and do hereby certify that the same is a true and correct
 transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City
 of New York, this 10th day of February, 1921.

S. FRANK HEDGES,

Attorney-in-fact.

44 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Second Department.

Present: Jenks, P. J.; Mills, Putnam, Blackmar and Kelly, JJ.

THE VALLEY FARMS COMPANY OF YONKERS, Respondent,

against

CITY OF YONKERS, Defendant; COUNTY OF WESTCHESTER, Appellant.

Appeal by Defendant the County of Westchester from an Inter-
 locutory Judgment of the Special Term Entered in the Office of
 the Clerk of the County of Westchester on the 7th Day of January,
 1920, Overruling the Demurrer Interposed by said Defendant to
 the Complaint.

William A. Davidson, County Attorney (Charles M. Carter, Dep-
 uty County Attorney, with him on the brief), for the appellant.

Robert C. Beatty (Roger H. Anderson with him on the brief),
 for the respondent.

45 BLACKMAR, J.:

The plaintiff herein seeks to have adjudged void and cancelled of
 record certain assessments against its property, levied for the purpose
 of paying for the construction and maintenance of the Bronx Valley
 sewer, and this necessarily involves the constitutionality of certain
 provisions of Chapter 646 of the Laws of 1917, which established a
 tax district including the property of the plaintiff and prescribed a
 method of levying a tax to meet the cost of the construction and
 maintenance of the sewer.

When the act mentioned was passed, the sewer had already been
 completed and was in operation. It was built under Chapter 646

of the Laws of 1905 and the acts amendatory thereof and supplementary thereto. Pursuant to the act of 1905, a district of assessment, which did not include plaintiff's land, had been established by the Commissioners, and the Legislature by the act of 1917 substituted in its place another district, created and bounded by the Legislature itself, which did include plaintiff's land. The plaintiff claims that its property is not benefited by the sewer, that the method of assessment is not in accordance with benefits, that no hearing is given on the apportionment of the tax; and that therefore, in its application to plaintiff's land, the act violates the Constitution of the State of New York (Art. 1, §6) and section 1 of the fourteenth amendment of the Constitution of the United States in that it takes plaintiff's property without due process of law and denies to it the equal protection of the law.

46 It is alleged in the complaint that the sewer already constructed is so located that only a portion of the property in the valley where plaintiff's property lies has access to it, and that the remainder of such property can have access only by the construction, at an expense of \$300,000, of a trunk sewer leading thereto; and that therefore the act of the Legislature in including such land within the tax district is arbitrary, unjust, and not justified by the benefits that the land receives from the sewer.

The plaintiff also claims that the adoption of the assessment rolls of the cities and towns wholly or partly in the District is beyond the power of the Legislature, in that, first, the parties are not given an opportunity to be heard, and, second, that such assessment bears no relation to the benefit that the different parcels of land received from the sewer.

Many decisions have been rendered by courts of last resort, of the State of New York, of other States, and of the United States, upon the questions involved in this appeal. I shall not attempt the burden of analyzing them, but shall confine myself to stating the principles that I deem to be established.

It is competent for the Legislature, under the taxing power, to determine the area of property benefited by the improvement, for the purpose of establishing a tax district, unless, as is said in *Branson v. Bush* (251 U. S. 182), it is "arbitrary and wholly unwarranted," "a flagrant abuse, and by reason of its arbitrary character is mere confiscation of particular property."

47 The property owners within the area of assessment are not entitled to be heard upon the question of the creation and limitation of the district, but they are entitled to be heard upon the apportionment of taxes within such district.

It is competent for the Legislature to create a tax district for the purpose of raising money to pay for improvements already made and, likewise, to substitute one tax district for another.

The Legislature may also determine the basis of assessment, whether it shall be on area, on value, on location with reference to the improvement, or on any other reasonable basis that the Legislature, in the exercise of its discretion, deems to be just and equitable.

I believe that these principles are established by the decisions of the courts and find expression in the following cases: *Gast Realty Co. v. Schneider Granite Co.* (240 U. S. 55); *Houck v. Little River Drainage District* (239 U. S. 254); *Myles Salt Co. v. Iberia Drainage Dist.* (239 U. S. 478); *Wagner v. Baltimore* (239 U. S. 207); *City of Seattle v. Kelleher* (195 U. S. 351); *Spencer v. Merchant* (125 U. S. 345); *Hancock v. City of Muskogee* (250 U. S. 454); *Matter of Trustees of Union College* (129 N. Y. 308); *Stuart v. Palmer* (74 N. Y. 183); *N. Y. Central & H. R. R. Co. v. City of Rochester* (129 App. Div. 805, *aff'd* 198 N. Y. 570); *Webster v. Fargo* (181 U. S. 394); *People ex rel. Scott v. Pitt* (169 N. Y. 521).

The complaint concedes that all the land lying within the boundaries of the tax district as established by the Act of 1917 has now, or may by the construction of a trunk sewer have access to
48 the outlet sewer forming part of the so-called Bronx Valley sewer. There is, therefore, a basis for the exercise of the legislative discretion in including this land within the tax district. It is not arbitrary, wholly unwarranted, or a flagrant abuse resulting in the confiscation of the plaintiff's property, to determine that this land is benefited by the existence of the sewer. It may be that a Court would not reach the same conclusion as the Legislature, and that the benefits conferred upon this portion of the district are much less than upon other portions. Conceding this, there nevertheless is a substantial basis for the exercise of the legislative discretion; and notwithstanding the constitutional limitations that the United States Supreme Court in its recent decisions has placed upon the legislative power to include property within the limits of a tax district, the facts alleged in the complaint do not show that the Legislature has passed beyond the constitutional limits of its power in this respect.

Under the authorities cited, the Legislature has undoubted power to prescribe the method under which the assessment shall be laid for the purpose of taxation. In this case it is based on value, as shown by the assessment rolls of the cities and towns wholly or partly within the sewer district. The plaintiff claims that equal protection of the law requires that the assessment should be laid on some basis other than value, for, it says, it is unjust that improved property should be assessed on the value of the improvements. I can
49 imagine no reason why the Legislature should not decide that the assessment may be properly based on value, and I think it within the scope of legislative power to decide that improved property is benefited as well as unimproved according to its value. This is a question for legislative determination, and if I thought the method led to injustice, which I do not, I could not substitute my judgment for that of the Legislature.

It is true that a property owner has the constitutional right to be heard upon the apportionment of the tax as between him and other property owners within the district. This apportionment is usually delegated to some commission or board which has quasi-judicial powers, upon the exercise of which the property owner is entitled to an opportunity to be heard. But in this case, by adopting

the assessment rolls of local assessors, the right to be heard as to the proper apportionment is preserved, not only by necessary implication, but by section 3 of the Act.

Although assessment for benefits is an exercise of the taxing power whereby the unearned increment is appropriated to pay for the improvement that created it, yet there is a certain analogy between the constitutional power of the Legislature to create such tax district for the purpose of assessment for benefits and other tax districts, including municipalities. The power of the Legislature to determine the boundaries of cities and of counties is unquestioned. Within the boundaries of the city, all property is taxed, whether it is improved or unimproved, whether it lies at the heart of the business district or on the outskirts, and without reference to the extent to which it may participate in the general benefits to secure which the taxes are levied. It has never, so far as I know, been held that it is unconstitutional to extend the limits of a city so as to include property which the owners claim is not interested, in the same proportion as other property, in the benefits conferred by the existence of the municipal government. Neither has the power of the Legislature to select the subjects of taxation, providing there is a substantial basis for the classification, ever been successfully challenged. So long as parties are treated alike with others in the same class, and so long as they have an opportunity to be heard upon the apportionment of the tax, as distinguished from the creation of the tax district and as distinguished from the classification of property that is to bear the burden of taxation, there is no room for valid complaint.

The interlocutory judgment should be reversed, with costs, and judgment granted sustaining the demurrer, with costs.

Jenks, P. J., Mills, Putnam and Kelly, JJ., Concur.

51

Waiver of Certification.

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the order and judgment of reversal of the Appellate Division, Second Department, appealed from the notice of appeal to the Court of Appeals, the undertaking on appeal to the Court of Appeals, and the opinion of the Appellate Division, Second Department, and all the papers upon which the Court below acted in making the order and judgment appealed from, and the whole thereof, now on file in the office of the Clerk of the County of Westchester, and certification thereof in pursuance of Section 1353 of the Code of Civil Procedure, is hereby waived.

Dated, New York, March 1, 1921.

ROBERT C. BEATTY,

Attorney for Plaintiff-Appellant.

WILLIAM A. DAVIDSON,

County Attorney.

Attorney for Defendant-Respondent, County of Westchester.

WILLIAM A. WALSH,

Corporation Counsel.

Attorney for Defendant City of Yonkers.

52 STATE OF NEW YORK, ss:

Court of Appeals.

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 10th day of May, in the year of our Lord one thousand nine hundred and twenty-one before the judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.

R. M. BARBER,

Clerk,

Remittitur, May 11, 1921.

THE VALLEY FARMS COMPANY OF YONKERS, Appellant,

agst.

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,

Respondent.

Be it remembered, That on the 9th day of March in the year of our Lord one thousand nine hundred and twenty-one The Valley Farms Company of Yonkers the appellant in this cause came here into the Court of Appeals, by Robert C. Beatty its attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And County of Westchester the respondent in said cause, afterward appeared in said Court of Appeals by William A. Davidson its attorney.

53 Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Robert C. Beatty of counsel for the appellant, and by Mr. William A. Davidson of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,

*Clerk of the Court of Appeals
of the State of New York,*

Court of Appeals, Clerk's Office.

Albany, May 11, 1921.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the paper originally filed therein, attached thereto.

[SEAL.]

R. M. BARBER,
Clerk.

Supreme Court of the United States.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.

STATE OF NEW YORK.

County of New York, ss:

Robert C. Beatty being duly sworn deposes and says that he is the attorney for the plaintiff in error herein and is familiar with the proceedings had in the above action; that no opinion was rendered by the Court of Appeals in affirming the judgment of the Appellate Division, Second Department, in this Section.

ROBERT C. BEATTY.

Sworn and subscribed to before me this 6th day of July, 1921.

[Seal of Roger H. Anderson, Notary Public, County of
New York.]

ROGER H. ANDERSON,
Notary Public, No. 85, New York County.

[Endorsed:] Supreme Court of the United States. The Valley Farms Company of Yonkers, Plaintiff in Error, against City of Yonkers, Defendant, and County of Westchester, Defendant in Error. Affidavit of no Opinion. Robert C. Beatty, Attorney for Plaintiff in error, 68 William Street, Borough of Manhattan, New York City. Filed Jul. 25, 1921. Louis N. Ellrodt, Clerk County of Westchester, State of New York.

Supreme Court, Westchester County

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff,
against

THE CITY OF YONKERS and COUNTY OF WESTCHESTER, Defendants

The above named plaintiff having appealed to the Court of Appeals from a judgment of the Supreme Court of the Appellate Di-

vision, Second Department, entered in this action on the 8th day of February, 1921, reversing the judgment entered therein on the 7th day of January, 1920, in the office of the Clerk of the County of Westchester, said judgment of reversal so entered as aforesaid having directed the dismissal of the complaint on the merits, pursuant to the order of the Appellate Division and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment rendered for the defendant, the County of Westchester, with costs and the record remitted from that court having been filed and an order having been entered thereon, making the judgment of the Court of Appeals the judgment of this court and directing the entry of a judgment of affirmance therein, with costs of said appeal against the plaintiff to be taxed.

Now on motion of William A. Davidson, attorney for the defendant, the County of Westchester, it is

Ordered, that the judgment in this action entered on the 8th day of February, 1921, be and the same is hereby affirmed with costs against the plaintiff to be taxed.

LOUIS N. ELLRODT,

Clerk.

58 [Endorsed:] Supreme Court Westchester County. The Valley Farms Company of Yonkers, Plaintiff, against The City of Yonkers and County of Westchester, Defendants. Judgment on Remittitur from Court of Appeals with Notice of Entry. William A. Davidson, County Attorney, Attorney for Defendant, County of Westchester, Office and Post Office Address, Court House, White Plains, N. Y. Sir: Please take notice that the within is a copy of a judgment this day entered in the office of the Clerk of the County of Westchester. Dated May 27th, 1921. William A. Davidson, Attorney for Deft. County of Westchester, Office & Post Office Address, Court House, White Plains, N. Y. To: Robert C. Beatty, Esq., Attorney for Plaintiff.

59 At a Special Term of the Supreme Court Held in and for the County of West Chester, at the Court House, in the City of White Plains, N. Y., on the 27th day of May, 1921.

Present: Hon. A. H. F. Seeger, Justice.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff,

against

THE CITY OF YONKERS and COUNTY OF WESTCHESTER, Defendants.

The above named plaintiff having appealed to the Court of Appeals from the judgment of this court, entered on the order of the Appellate Division of the Second Department, on the 8th day of February, 1921, reversing the judgment entered therein on the 7th

day of January, 1920, in the office of the Clerk of the County of Westchester, said judgment of reversal so entered as aforesaid having directed the dismissal of the complaint on the merits pursuant to the order of the Appellate Division, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed and judgment entered for the defendant, the County of Westchester, with costs and the remittitur from that court having been filed.

Now on motion of William A. Davidson, attorney for the defendant, the County of Westchester, it is

Ordered, that the said judgment of the Court of Appeals be and the same is hereby made the judgment of this court and that the judgment entered herein on the 8th day of February, 1921, be and the same is hereby affirmed and that the judgment of this court be entered herein, affirming said judgment with costs against the plaintiff to be taxed.

(S.)

A. H. F. SEEGER,
Justice Supreme Court.

[Endorsed:] Supreme Court Westchester County. The Valley Farms Company of Yonkers, Plaintiff, against The City of Yonkers and County of Westchester, Defendants. Order for Judgment on Remittitur from Court of Appeals with Notice of Entry. William A. Davidson, County Attorney, Attorney for Defendant County of Westchester, Office and Post Office Address, Court House, White Plains, N. Y. Sir: Please take notice that the within is a copy of an order this day entered in the office of the Clerk of the County of Westchester. Dated May 27th, 1921. William A. Davidson, Attorney for Deft. County of Westchester, Office & P. O. Address, Court House, White Plains, N. Y. To: Robert C. Beatty, Esq., Attorney for Plaintiff.

Court of Appeals, State of New York.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,
against
CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.

Petition for Writ of Error.

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals:

The petition of The Valley Farms Company of Yonkers, respectfully shows:

First. That on or about the 10th day of May, 1921, the Court of Appeals of the State of New York made and entered a final order and judgment herein, affirming the final judgment of the Appellate Division of the State of New York, Second Department, which judg-

ment of the Appellate Division, Second Department reversed the interlocutory judgment of the Supreme Court of the State of New York, entered in the office of the Clerk of the County of Westchester, on the 7th day of January, 1920, overruling the demurrer interposed by the defendant County of Westchester, and which judgment of the Appellate Division sustained the demurrer of the County of Westchester and dismissed the complaint herein. There-
63 after on or about the 27th day of May, 1921, the records and proceeding- in said cause having been remitted to the said Supreme Court of the State of New York, in and for the County of Westchester, the said final order and judgment of the Court of Appeals were made and entered as the final judgment of the said Supreme Court.

Second. The said Court of Appeals of the State of New York is the highest court of the said State of New York in which a decision could be had in said cause.

Third. By the said final order and judgment entered in the said Supreme Court of the State of New York and the proceedings had prior thereunto in this cause, your petitioner had been denied the guaranty and protection provided for by the Constitution of the United States and a right, privilege or immunity especially set up and claimed by your petitioner under the said Constitution has been denied and the validity of an Act of the legislature of the State of New York in imposing an assessment upon the plaintiff's property for the construction and maintenance of a sewer, which was drawn in question on the ground of it being repugnant to the Constitution of the United States was upheld, all of which has been made to appear on the record of the said cause as will more fully appear by an inspection of the said record and of the assignment of errors, filed with this petition and from the briefs submitted on behalf of the petitioner to the said Appellate Division and Court of Appeals.

Fourth. A copy of the said printed record which contains a copy
64 of the opinion of the Appellate Division of the Supreme Court of the State of New York, for the Second Department on making its final judgment herein is submitted herewith and copies of briefs submitted by your petitioner to the said Appellate Division and the Court of Appeals are submitted herewith. The federal questions above referred to appear in all of the said briefs and the complaint herein expressly alleges "that the said act as amended, which included all of the plaintiff's said property in the area for assessments provided therein, is in violation of the Fourteenth Amendment of the Constitution of the United States of America * * * in that it deprives plaintiff of its property without due process of law and without just compensation and denies to it the equal protection of the law."

Wherefore, your petitioner prays that a writ of error may issue in the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of the errors and the

reversal of the final judgment so complained of, that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States and that your petitioner may have such other and further relief in the premises as may be just.

Dated New York the 5th day of July, 1921.

THE VALLEY FARMS COMPANY OF
YONKERS,
By ALEXANDER STOLZ,
Secretary and Treasurer.

ROBERT C. BEATTY,
Attorney for Petitioner.

No. 68 William Street, Borough of Manhattan, City of New York.

65 STATE OF NEW YORK,
County of New York, ss:

Alexander Stolz being duly sworn deposes and says that he is the secretary and treasurer of The Valley Farms Company of Yonkers, the petitioner herein; that he has read the foregoing petition and knows the contents thereof and that the same is true of his knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true.

Deponent further says that the reason this verification is not made by the petitioner is that it is a domestic corporation; that all the material allegations of the petition are within the knowledge of he deponent, having charge of the property of the company and in connection therewith kept informed of all charges and attempted charges for taxes and assessments thereon and in looking after all the details affecting the said property.

ALEXANDER STOLZ.

Sworn to before me this 5th day of July, 1921.

ROGER H. ANDERSON,
Notary Public, No. 65, New York County.

66 [Endorsed:] Copy. Court of Appeals, State of New York.
The Valley Farms Company of Yonkers, Plaintiff in Error,
against City of Yonkers, Defendant, and County of Westchester.
Defendant in Error. Petition for Writ of Error. Copy. Robert
C. Beatty, Attorney for Plaintiff in Error. 68 William Street,
Borough of Manhattan, New York City. Filed July 25, 1921.
Louis N. Ellrodt, Clerk, County of Westchester, State of New York.
Read on application for writ July 14, 1921. F. H. H. Chf. Judge.

67

Court of Appeals, State of New York.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,

against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.*Assignment of Errors.*

Now comes the above named, The Valley Farms Company of Yonkers, and in connection with the petition for a writ of error by it herewith says that in the records and proceedings in this cause and in the final judgment made and entered herein on the 27th day of May, 1921, by the Supreme Court of the State of New York, in and for the County of Westchester, upon the remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

First. The Court of Appeals of the State of New York and the Appellate Division of the Second Department erred in reversing the interlocutory judgment of the Supreme Court of the State of New York, in and for the County of Westchester, which interlocutory judgment overruled the demurrer of the defendant, County of Westchester and in dismissing the complaint.

68 Second. That the court erred in holding that Chapter 646 of the Laws of 1905 of the State of New York entitled "An Act to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the County of Westchester, and to provide means for the payment therefor," as amended by Chapter 747 of the Laws of 1907, Chapter 96 of the Laws of 1909, Chapters 361 and 869 of the Laws of 1911, Chapter 550 of the Laws of 1912, Chapter 417 of the Laws of 1913, Chapter 487 of the Laws of 1914, Chapters 425 and 655 of the Laws of 1915, Chapters 44 and 245 of the Laws of 1916, Chapter 646 of the Laws of 1917 and Chapters 82 and 535 of the Laws of 1918, is constitutional and does not violate the Fourteenth Amendment to the Constitution of the United States.

Third. The court erred in holding that the act provides for notice and hearing as to the apportionment of the assessments upon plaintiff's property.

Fourth. The court erred in holding that the said act does not deprive the plaintiff of its property without just compensation and without due process of law because it assesses such property equally with all other property within the assessment area for the whole cost of the sanitary outlet sewer and the whole cost of the sanitary trunk sewer, whereas the plaintiff's property can make no use whatever of such sanitary trunk sewer eleven and three-quarters

miles in length, and only a partial use of about one-half of the length of the sanitary outlet sewer about three miles in length. Such partial use even as to most of plaintiff's property can only begin upon the construction of a trunk sewer in the Tibbets Valley about four miles in length and costing over \$300,000.

Fifth. The court erred in holding that such assessments under such act are not wholly disproportioned to benefits in that they are based solely upon the assessments for general taxation, resulting in the arbitrary adoption of the value of the lots as they happen to be laid out on the tax maps without regard to frontage upon any street or depth of the property, or the distance of large tracts assessed as one lot from the sewer.

Sixth. The court erred in holding that such act was constitutional although the assessments upon improved property are based on the assessed value of lands and buildings, while those on vacant property are based on the assessed value of the land.

Seventh. The court erred in holding that such act as amended was valid, although the supervisors of the County of Westchester in determining the aggregate amount to be collected by the assessment for each year were to include certain unconstitutional and unlawful items such as a contingent fund to meet deficiencies of revenue and the cost of all litigation now or hereafter incurred.

Eighth. The Court erred in upholding the validity of such act although such act was enacted in the year 1905 and as amended up to the year 1917 provided for the fixing of the area for assessments by the commissioners appointed under such act and such area was fixed with opportunity to the property owners to be heard after notice to them and the work was entirely completed in 1913 and notwithstanding the fixing of the rights and liabilities of all property owners, the legislature in 1917 attempted to substitute a different assessment area described by metes and bounds.

Wherefore, the said The Valley Farms Company of Yonkers pray that the final order and judgment in the said Supreme Court of the State of New York entered in the office of the Clerk of the County of Westchester on the 27th day of May, 1921, pursuant to the said remittitur of the said Court of Appeals of the State of New York, be reversed and that judgment be rendered in favor of the plaintiff in error and annulling the said judgment and cancelling the assessment and lien sought to be imposed upon its property and for such other and further relief as may be just and proper in the premises, with costs in all the courts.

ROBERT C. BEATTY,
Attorney for Plaintiff in Error.

No. 68 William Street, Borough of Manhattan, City of New York

[Endorsed:] Copy. Court of Appeals, State of New York
The Valley Farms Company of Yonkers, plaintiff in error
against City of Yonkers, defendant, and County of Westchester, de

fendant in error. Assignment of errors. Copy. Robert C. Beatty, attorney for plaintiff in error, 68 William Street, Borough of Manhattan, New York City. Filed July 25, 1921. Louis N. Ellrodt, clerk County of Westchester, State of New York. Read on application for writ July 14, 1921. F. H. H., Chf. Judge.

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Court of Appeals, State of New York.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.

Order of Allowance of Writ of Error.

The above entitled matter coming on to be heard on the petition of The Valley Farms Company of Yonkers for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, in and for the County of Westchester and upon the examination of said petition and the record of said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter and a bond having been furnished by the plaintiff conditioned according to law in the sum of Five hundred (\$500.00) Dollars:

Now therefore, it is ordered that a writ of error be and the same hereby is allowed to the Supreme Court of the State of New York, in and for the County of Westchester and that a true copy of the record, assignment of errors, and all proceedings in this cause be transmitted to the Supreme Court of the United States duly certified according to law in order that said court may inspect the same and take such action thereon as it deems proper according to the law.

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Dated Albany, N. Y., July 14th, 1921.

FRANK H. HISCOCK,
Chief Judge of the Court of Appeals.

74

[Endorsed:] Court of Appeals, State of New York. The Valley Farms Company of Yonkers, Plaintiff in error, against The City of Yonkers, Defendant, and County of Westchester, Defendant in error. Order of Allowance of Writ of Error. Robert C. Beatty, Attorney for Plaintiff in error, 68 William Street, Borough of Manhattan, New York City. Filed Jul. 25, 1921. Louis N. Ellrodt, Clerk, County of Westchester, State of New York.

Court of Appeals, State of New York.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff-in-Error,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant-in-Error.

Know all men by these presents:

That we, The Valley Farms Company of Yonkers, as Principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland, having an office and usual place of business at No. 47 Cedar Street, in the Borough of Manhattan, City of New York, as Surety, are held and firmly bound unto the County of Westchester, in the full and just sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, to be paid to the said *the* County of Westchester, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally, firmly by these presents.

Scaled, with our seals and dated this 5th day of July, 1921.

Whereas, on the 10th day of May, 1921 the Court of Appeals of the State of New York entered its order and judgment against the Plaintiff-in-error, affirming the judgment of the Appellate Division, Second Department, with costs in the above entitled matter, and the said The Valley Farms Company of Yonkers having obtained a Writ of Error and filed a copy thereof in the Clerk's Office of said Court
76 to reverse the said order of judgment and a citation directed to the said The Valley Farms Company of Yonkers citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, therefore, the Condition of the above Obligation is such, that if the said The Valley Farms Company of Yonkers shall prosecute its writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Corporate Seal.] THE VALLEY FARMS COMPANY
OF YONKERS.

By ALEXANDER STOLZ,

Secretary and Treasurer.

[Corporate Seal.] UNITED STATES FIDELITY AND
GUARANTY COMPANY.

By S. FRANK HEDGES, *Attorney-in-fact.*

Attest:

ADOLPHUS A. JACKSON,

Attorney-in-fact.

Signed and Delivered in the Presence of:

R. H. ANDERSON.

STATE OF NEW YORK,
County of New York, ss:

On this 5th day of July, 1921, before me personally appeared Alexander Stolz, the Secretary and Treasurer of The Valley Farms Company of Yonkers with whom I am personally acquainted, who, being by me duly sworn said: That he resides in the State of New York in City of Yonkers that he is Secretary and Treasurer of The Valley Farms Company of Yonkers the corporation described in and which executed the above instrument that he knows the corporate seal of said corporation; that the seal affixed to the within instrument is such seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto as Secretary and Treasurer by like authority.

[SEAL.]

ROGER H. ANDERSON,
Notary Public, No. 85, New York County.

77 & 78 STATE OF NEW YORK,
County of New York, ss:

On the 5th day of July, 1921, before me personally came S. Frank Hedges, to me known, who, being by me duly sworn, did depose and say that he resides in the City of New York; that he is Attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the said Company has received from the Superintendent of Insurance of the State of New York a certificate of solvency and of its sufficiency as surety or guarantor, under Chapter 182 of the Insurance Law of the State of New York as amended by Chapter 182 of the Laws of 1913, and that such certificate has not been revoked. And the said S. Frank Hedges further said that he is acquainted with Adolphus A. Jackson and knows him to be the Attorney-in-fact of said Company; that the signature of said Adolphus A. Jackson subscribed to the within instrument, is in the genuine handwriting of said Adolphus A. Jackson, and was subscribed thereto by like order of said Board of Directors, and in the presence of him the said S. Frank Hedges.

JAMES A. STARR,
Commissioner of Deeds for the City of New York.

Term expires November 11, 1921.

Certificates filed in Richmond County and the following Counties: County Clerk's Nos.: N. Y. 411, Kings 300, Queens 3946, Bronx 51, Registers' Nos. New York 21191, Kings, 1137, Bronx 21055.

At a special meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 26th day of

October, A. D. 1920, the following resolution was unanimously adopted:

Resolved, That Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick, or Gilman Ashburner, or A. Van Tambacht, or J. Frank Supplee, or E. G. Babcock, or George A. Reading, or C. D. Marsac, or S. Frank Hedges, or Charles E. Finken, or Kearn J. Mullen, or Albert J. Rowland, or Kenneth H. Wood, Attorneys-in-fact of this Company in the State of New York, be and they hereby are, and each of them is authorized and empowered to execute and deliver and to attach the seal of the Company to any and all bonds and undertakings for or on behalf of the Company in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required, including co-suretyship and re-insurance agreements, and all other bonds, undertakings or guarantees of whatsoever nature not specifically covered by the foregoing authority; such bonds, undertakings and agreements, however, to be attested in every instance by one other of the persons above named, as occasion may require, provided that if such bonds, undertakings and agreements are not executed by either Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick, then and in such event said bonds, undertakings and agreements shall be attested by either the said Alonzo Gore Oakley, or Edw. R. Lewis, or Adolphus A. Jackson, or William H. Estwick; and the aforesaid Attorneys-in-fact are, and each of them is hereby authorized and empowered to certify a copy of this resolution under the seal of this Company.

STATE OF NEW YORK.

County of New York, ss:

I, S. Frank Hedges, Attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the City of New York, this 5th day of July, 1921.

S. FRANK HEDGES,
Attorney-in-fact.

United States Fidelity and Guaranty Company,
Baltimore, Md.

At the Close of Business March 31, 1921.

Commenced Business August 1, 1896.

Par value.	<i>Assets.</i>	Market value.
\$7,061,000.00	Government Bonds	\$6,654,512.33
5,520,549.72	Baltimore City and other Municipal, State and County Bonds	4,934,240.59
2,417,600.00	Railroad and Equipment Bonds	1,985,819.50
235,000.00	Electric Railway Bonds	161,887.50
4,005,908.22	Public Utility and Miscellaneous Bonds	3,555,653.25
283,465.00	Bank and Trust Company Stocks	642,159.50
168,600.00	Railroad Stocks	125,687.00
460,375.00	Miscellaneous Stocks	348,462.50
100,000.00	Lawyers Surety Co. Stock, represented by \$150,000 New York City Bonds deposited with the Superintendent of Insurance of the State of New York, and other assets	140,000.00
<hr/>		
\$20,252,497.94	Total Bonds and Stocks—Market Values March 31st, 1921.....	\$18,548,422.17
Home Office Property appraised by Insurance Department of Maryland		750,000.00
Other Property appraised by Insurance Department of Maryland		248,248.63
New York Property, appraised by Insurance Department of New York		850,000.00
Loans secured by pledge of Collaterals		81,312.69
Loans secured by Mortgages		54,300.00
Cash on Hand and in Depositories		2,915,886.37
Premiums in course of collection, not more than three months due		6,067,615.61
Deposits with Workmen's Compensation Reinsurance Bureau		255,823.92
Interest due and accrued		299,124.59
Due for Subscriptions, Department and Guaranteed Attorneys		75,416.49
Other Assets		98,017.16
		<hr/>
		\$30,244,167.63

Liabilities.

Capital Stock paid in cash.....	\$4,500,000.00	
Due for Return Premiums and Reinsurance.....	153,352.41	
Funds held under Reinsurance Treaties.....	34,642.78	
Reserve for 1921 Taxes and Expenses in Transit...	244,955.43	
Commissions accrued on uncollected premiums....	1,114,831.40	
Premium Reserve Computed in Accordance with Require- ments of New York Insurance Department	\$10,489,389.25	
Reserve for Claims Admitted and not Admitted, all Depart- ments, in accordance with New York Laws	9,717,834.93	
Surplus	3,989,161.43	24,196,385.61
		<hr/>
		\$30,244,167.63

STATE OF NEW YORK.

County of New York, ss:

S. Frank Hedges, being duly sworn, says: that he is the Attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company, as of September 30, 1920, and that the financial condition of said Company is as favorable now as it was when such statement was made.

S. FRANK HEDGES.

Subscribed and sworn to before me this 5th day of July, 1921.

JAMES A. STARR,

Commissioner of Deeds for the City of New York.

Term expires November 11, 1921.

Certificates filed in Richmond County and the following Counties
County Clerks' Nos.: N. Y. 411, Kings 300, Queens 3946, Bronx 51
Registers' Nos., New York 21191, Kings, 1137, Bronx 21055.

79 [Endorsed:] County Clerk's File No. —. Court of Appeals, State of New York. The Valley Farms Company of Yonkers, Plaintiff-in-error, against City of Yonkers, Defendant, and County of Westchester, Defendant-in-error. Appeal bond. Robert C. Beatty, Attorney for Plaintiff-in-error, 68 William St., New York City. Filed July 22, 1921. Louis N. Ellrodt, Clerk, County of Westchester, State of New York. The within undertaking is approved as to form and as to the sufficiency of the surety. Frank H. Hiscock, Chf. Judge. United States Fidelity and Guaranty Co. 47 Cedar Street, New York City. Surety.

80 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the final judgment or order, which is in the said Supreme Court of the State of New York, in and for the County of Westchester, upon a remittitur from the Court of Appeals, the same being the highest court of law or equity of said state in which a decision could be had in the said suit between The Valley Farms Company of Yonkers, plaintiff in error and City of Yonkers, defendant, and County of Westchester, defendant in error, wherein was drawn in question the validity of a statute of, or an authority exercised under said state on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of their validity; or wherein a title, right, privilege or immunity was claimed under the Constitution of the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under said constitution, a manifest error hath happened to the great damage of the said The Valley Farms Company of Yonkers, as by its petition appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things

81 concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court of the United States at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States ought to be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, this 18th day of July, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
*Clerk of the District Court of the United States
 for the Southern District of New York.*

Allowed by: Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals, of the State of New York.

82 [Endorsed:] Supreme Court of the United States. The Valley Farms Company of Yonkers, Plaintiff in error, against City of Yonkers, Defendant, and County of Westchester, Defendant in error. Writ of Error. Robert C. Beatty, Attorney for

Plaintiff in error, 68 William Street, Borough of Manhattan, New York City. Filed Jul- 25, 1921. Louis N. Ellrodt, Clerk County of Westchester, State of New York.

83 Supreme Court of the United States.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.

I, William A. Davidson, County Attorney and attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the herein citation and enter an appearance in the Supreme Court of the United States.

Dated White Plains, N. Y. July 25, 1921.

WILLIAM A. DAVIDSON,

County Attorney, Attorney for Defendant in Error.

Court House, White Plains, New York.

[Endorsed:] Filed Jul. 25, 1921. Louis N. Ellrodt clerk.

84 UNITED STATES OF AMERICA, 537

To County of Westchester, Greeting

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the County of Westchester, State of New York, wherein The Valley Farms Company of Yonkers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the final judgment or order rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, this 25th day of July, in the year of our Lord one thousand nine hundred and twenty-one.

FRANK H. HISCOCK,

*Chief Judge of the Court of Appeals
of the State of New York.*

85 [Endorsed:] Supreme Court of the United States. The Valley Farms Company of Yonkers, plaintiff in error, against City of Yonkers, defendant, and County of Westchester, defendant in error. Citation. Robert C. Beatty, attorney for plaintiff in error, 68 William Street, Borough of Manhattan, New York City. Filed Jul- 25, 1921. Louis N. Ellrodt, clerk County of Westchester, State of New York.

86 New York Supreme Court, County of Westchester.

THE VALLEY FARMS COMPANY OF YONKERS, Plaintiff in Error,
against

CITY OF YONKERS, Defendant, and COUNTY OF WESTCHESTER,
Defendant in Error.

STATE OF NEW YORK,
County of Westchester, ss:

I, Louis N. Ellrodt, Clerk of the Supreme Court of the State of New York, in and for the County of Westchester, and Clerk of the County of Westchester, pursuant to a writ of error directed to the Justices of the Supreme Court of the State of New York, in and for the County of Westchester, which said writ was allowed by Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York and signed by the Clerk of the United States District Court, for the Southern District of New York, do hereby certify that the writing hereto attached is a true, complete and perfect copy of the record, assignment of errors, petition and bond, and all proceedings in proceedings entitled The Valley Farms Company of Yonkers, plaintiff in error, against City of Yonkers, defendant and County of Westchester, defendant in error, as the same remains
on file and on record in said case in my office; that attached
87 to said papers is the writ of error, allowance of writ of error, citation with proof of service thereof, all filed in the office of this court and the same are the originals thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Westchester Co. this 25 day of July, in the year of our Lord, one thousand nine hundred and twenty-one.

[Seal of Westchester County.]

LOUIS N. ELLRODT,
Clerk.

Endorsed on cover: File No. 28,403. New York Supreme Court, Term No. 448. The Valley Farms Company of Yonkers, plaintiff in error, vs. County of Westchester. Filed August 3d, 1921. File No. 28,403.

Office Supreme Court, U.

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WM. R. STANSBU

CLERK

Supreme Court of the United States

No. 136.

OCTOBER TERM, 1922.

THE VALLEY FARMS COMPANY OF YONKERS,
Plaintiff-in-Error,

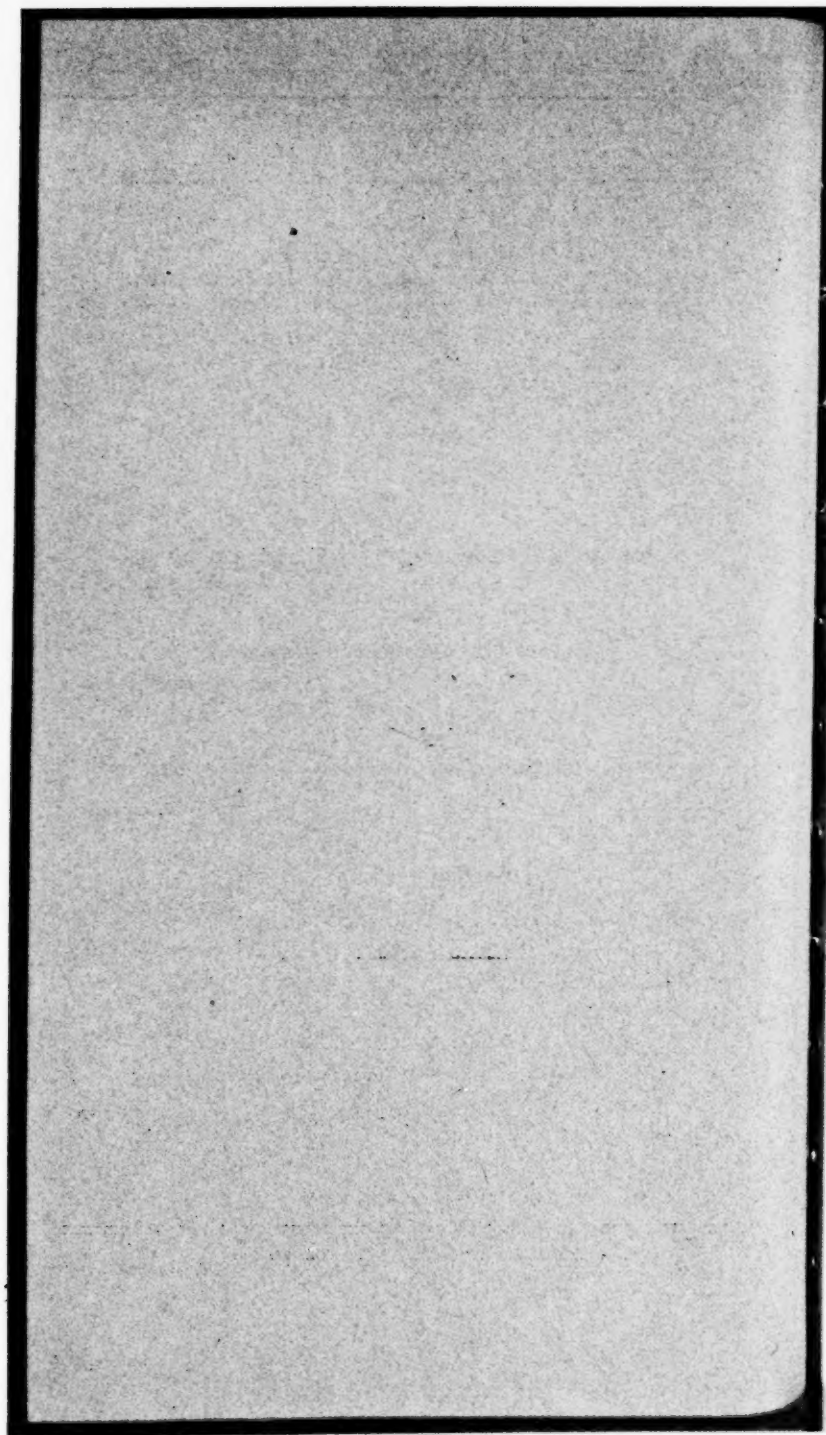
against

COUNTY OF WESTCHESTER,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

ROBERT C. BEATTY,
Counsel for Plaintiff-in-Error.



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Supreme Court of the United States

No. 136—OCTOBER TERM, 1922.

THE VALLEY FARMS COMPANY
OF YONKERS,
Plaintiff-in-Error,
against
COUNTY OF WESTCHESTER,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE
OF NEW YORK.

BRIEF FOR PLAINTIFF-IN-ERROR.

Writ of error to the Supreme Court of the State of New York from a final judgment entered upon the remittitur of the Court of Appeals of the State of New York affirming the final judgment of the Appellate Division of the Supreme Court, Second Department, reversing an interlocutory judgment of the Supreme Court, Westchester County (which had overruled the demurrer to the complaint interposed by the County of Westchester, defendant), such judgment of reversal further sustaining such demurrer and dismissing the complaint upon the ground that the complaint did not state a cause of action.

Statement of the Case.

(a) THE PROCEEDINGS IN THE CASE.

Plaintiff sues in equity to have assessments for the Bronx Valley sewer cancelled and their collection restrained on the ground that the law under which they were imposed is in violation of the Fourteenth Amendment of the Constitution of the United States (Complaint, Twenty-third, Transcript of Record, p. 17).

The County of Westchester, defendant-in-error, interposed a demurrer to the complaint upon the ground that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action (Complaint, Record, pp. 3-18; Demurrer, p. 18).

The defendant City of Yonkers interposed an answer to the complaint (p. 1).

The Supreme Court at Special Term overruled this demurrer of the County of Westchester and from the interlocutory judgment entered thereon the County of Westchester, defendant, appealed to the Appellate Division of the Supreme Court, Second Department (Decision, pp. 18, 19; Interlocutory Judgment, p. 19; Notice of Appeal, p. 2; Opinion, pp. 19, 20).

The Appellate Division of the Supreme Court, Second Department, reversed this interlocutory judgment overruling the demurrer of the County of Westchester, defendant-in-error. Such order of reversal provided further that the said demurrer be sustained *and the complaint dismissed*. Upon such order of reversal the final judgment appealed from was entered reversing the interlocutory judgment and sustaining the demurrer of the County

of Westchester and dismissing the complaint. This judgment was entered directly upon such order of the Appellate Division without any application to the Court at Special Term. From such final judgment of the Appellate Division dismissing the complaint herein an appeal was taken to the Court of Appeals. An opinion was written by the Appellate Division (Order of Appellate Division, pp. 20, 21; Final Judgment entered thereon, pp. 21, 22; Notice of Appeal to the Court of Appeals, p. 22; Opinion of Appellate Division, pp. 25-28).

Reported in 193 App. Div., 433.

The Court of Appeals of the State of New York affirmed such judgment without opinion (Remittitur from Court of Appeals, pp. 29, 30). Final judgment was thereupon entered in this action affirming the judgment dismissing the complaint with costs (Judgment and Order for Judgment, pp. 30-32).

Reported in 231 N. Y., 558.

On petition of the plaintiff-in-error (the plaintiff below), a writ of error was allowed to this Court (Petition for Writ of Error, pp. 32-34; Assignment of Errors, pp. 35, 36; Order for Allowance of Writ of Error, p. 37; Writ of Error, pp. 43, 44; Citation, p. 44).

(b) THE QUESTION INVOLVED.

The question here involved is whether the statutes of the State of New York, under which the over a large area of many square miles, in West-Bronx Valley sewer assessments were imposed, } *transpose*

chester County, New York, are in contravention of due process of law under the Fourteenth Amendment of the Constitution of the United States (Complaint, Twenty-third, p. 17).

The sewer for which the assessments in question were levied consisted of a trunk sewer, for house drainage only, about eleven and three-quarter miles in length, running from North White Plains in a southerly direction through the center of the Bronx Valley to about the southerly line of Westchester County in the City of Yonkers; thence an outlet sewer about three miles in length ran westerly to the Hudson River (Complaint, Seventh and Ninth, pp. 11 and 13).

The statute, Laws of 1905, Chapter 646, originally provided for a map, showing the assessment area, to be prepared by Commissioners after notice to and hearing of property owners on the question of whether their lands should be included in the benefit area (see statutes, *infra*, pp. 20-23).

A supplemental statute (Laws 1917, Chap. 646), however, wiped out this map and substituted an area of assessment defined by the Legislature by metes and bounds. It provides that the total cost of construction and maintenance shall be assessed upon the property within such benefit area pro rata based on the assessed value for general taxation of each property (including improvements). Thus each property in this large area is treated exactly alike in this sewer assessment (Supplemental Statute, *infra*, pp. 23-28; Complaint, Sixteenth, p. 15).

Such assessment disregards the differences of location and benefit of the many parcels of land assessed and imposes an equal rate of assessment based on value upon all.

No notice to property owners or hearing *upon the apportionment of the assessment upon the particular parcel* is provided for, the legislative plan preventing such course by establishing a fixed rule of equal assessments upon all computed on the assessed value for general taxation (Point I, *infra*, pp. 29-40).

The property of the plaintiff-in-error is situated in the Tibbetts Valley, not the Bronx Valley. The sewer is a gravity sewer and such property cannot be connected with the sewer in the Bronx Valley because such sewer is all upgrade from the property of the plaintiff-in-error and the valleys are separated by a high ridge. The only use that could, in any event, be made by the property of the plaintiff-in-error is to connect another trunk sewer in Tibbetts Valley to the outlet sewer about a mile and a half from its outfall in the Hudson River. Such trunk sewer has not yet been planned or constructed and its cost would exceed \$300,000, as it would be about four miles in length (Complaint, Thirteenth, Fourteenth and Fifteenth, pp. 14-15).

The statutes in question are believed to be unconstitutional in that they provide for no notice or hearing *upon the apportionment* of the assessments upon the property of the plaintiff-in-error (Point I, *infra*, pp. 29-40). Such property is assessed at equal rates for the whole cost of the fifteen-mile sewer based on the value for general taxation, wholly without regard to the vastly differing conditions which exist as to property in the Tibbetts Valley from property in the Bronx Valley. Thus gross discrimination results (Point II, *infra*, pp. 41-53).

Again, the adoption of the assessed value of the property for purposes of general taxation, as as-

sessed against lots and plots as they happen to be laid out on such assessment maps, results in assessments for this sewer improvement laid without regard to the relation of such lands to the sewer or what if any street frontage such lots have or the shape or depth of such lots (Point III, *infra*, pp. 54, 55). An extreme example contained in the record here is the assessment for this sewer improvement of the Dunwoodie Golf Links, club house and all, owned by the plaintiff-in-error, on a valuation of \$300,000, being its assessed value for general taxation. (This property is shown in the Complaint at page 10 of the record.)

The improvement is confined to a trunk sewer for house drainage only, and yet the value assessments are based on the value of the land with the improvements thereon, so that adjoining lots of equal size pay greatly differing assessments, depending on the value of the improvements thereon (Point IV, *infra*, pp. 56-58).

The Legislature, having defined the area benefited and declared that some benefit has accrued to the property therein, cannot, we submit, go further and provide for this house drainage trunk sewer improvement a pro rata assessment against all the property within such area covering many square miles without notice to and hearing of the property owners on the apportionment of the total assessments against the particular lots and without regard to the differences in location in relation to the sewer and indeed whether the property can make any use whatever of the improvement in question.

Such a statute as we have here is, we submit, "of such a character that there is no reasonable presumption that substantial justice generally will

be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred," so such legislative action is "palpably arbitrary or a plain abuse." The statute, we submit, is "bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed but in blind obedience to a rule that requires this result." Thus the statute is unconstitutional under the test of the rules quoted from

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S., 55.

Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S., 658.

Myles Salt Co., Ltd., v. Board of Commissioners, 239 U. S., 478.

Assignment of Errors.

(Record, pp. 35, 36.)

First. The Court of Appeals of the State of New York and the Appellate Division of the Second Department erred in reversing the interlocutory judgment of the Supreme Court of the State of New York, in and for the County of Westchester, which interlocutory judgment overruled the demurrer of the defendant County of Westchester, and in dismissing the complaint (Points I to VI, *infra*, pp. 29-66).

Second. That the Court erred in holding that Chapter 646 of the Laws of 1905 of the State of New York, entitled "An Act to provide for the

construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the County of Westchester, and to provide means for the payment therefor," as amended by Chapter 747 of the Laws of 1907, Chapter 96 of the Laws of 1909, Chapters 361 and 869 of the Laws of 1911, Chapter 550 of the Laws of 1912, Chapter 417 of the Laws of 1913, Chapter 487 of the Laws of 1914, Chapters 425 and 655 of the Laws of 1915, Chapters 44 and 245 of the Laws of 1916, Chapter 646 of the Laws of 1917 and Chapters 82 and 535 of the Laws of 1918, is constitutional and does not violate the Fourteenth Amendment to the Constitution of the United States (Points I to VI, *infra*, pp. 29-66).

Third. The Court erred in holding that the Act provides for notice and hearing as to the apportionment of the assessments upon plaintiff's property (Point I, *infra*, pp. 29-40).

Fourth. The Court erred in holding that the said Act does not deprive the plaintiff of its property without just compensation and without due process of law because it assesses such property equally with all other property within the assessment area for the whole cost of the sanitary outlet sewer and the whole cost of the sanitary trunk sewer, whereas the plaintiff's property can make no use whatever of such sanitary trunk sewer eleven and three-quarters miles in length, and only a partial use of about one-half of the length of the sanitary outlet sewer about three miles in length. Such partial use even as to most of plaintiff's property can only begin upon the construction of a trunk sewer in the Tibbetts Valley about four miles in length and costing over \$300,000 (Point II, *infra*, pp. 41-53).

Fifth. The Court erred in holding that such assessments under such Act are not wholly disproportionate to benefits in that they are based solely upon the assessments for general taxation, resulting in the arbitrary adoption of the value of the lots as they happen to be laid out on the tax maps without regard to frontage upon any street or depth of the property, or the distance of large tracts assessed as one lot from the sewer (Point III, *infra*, pp. 54, 55).

Sixth. The Court erred in holding that such act was constitutional, although the assessments upon improved property are based on the assessed value of lands and buildings, while those on vacant property are based on the assessed value of the land (Point IV, *infra*, pp. 56-58).

Seventh. The Court erred in holding that such Act as amended was valid, although the Supervisors of the County of Westchester in determining the aggregate amount to be collected by the assessments for each year were to include certain unconstitutional and unlawful items such as a contingent fund to meet deficiencies of revenue and the cost of all litigation now or hereafter incurred (Point V, *infra*, pp. 58-63).

Eighth. The Court erred in upholding the validity of such Act although such Act was enacted in the year 1905 and as amended up to the year 1917 provided for the fixing of the area for assessments by the commissioners appointed under such Act and such area was fixed with opportunity to the property owners to be heard after notice to them and the work was entirely completed in 1913 and

notwithstanding the fixing of the rights and liabilities of all property owners, the Legislature in 1917 attempted to substitute a different assessment area described by metes and bounds (Point VI, *infra*, pp. 63-66).

Statement of Facts.

The complaint seeks to have the assessments upon the plaintiff's property for the Bronx Valley sewer adjudged void and cancelled and the City of Yonkers and its agents restrained from collecting them (Complaint, p. 17).

The facts as alleged in the complaint are all admitted by the demurrer.

The plaintiff is the owner of a large acreage in the Tibbetts Valley, in the City of Yonkers, near the southern boundary of Westchester County. The lots owned by it which are assessed for the year 1918 for the Bronx Valley sewer are enumerated in paragraph Fourth of the complaint (pp. 3-10).

In all cases where the whole of said lot is within the area of assessment for the Bronx Valley sewer, the assessment for the Bronx Valley sewer is identical with the assessments on said properties for the year 1918 by the City of Yonkers for general taxation (Complaint, Fourth, p. 3).

The plaintiff is engaged in the business of developing its said real estate for the purpose of sale. It sells home sites, plots and lots (Complaint, Fifth, p. 10).

The original Bronx Valley Sewer Act is Chapter 646 of the Laws of 1905 of the State of New York, entitled "An Act to provide for the construction and maintenance of a sanitary trunk sewer and

sanitary outlet sewer in the County of Westchester, and to provide means for the payment therefor." The complete list of amendments to this Act, fourteen in number, are set forth in the complaint (Sixth, p. 11).

The complaint, in paragraphs Seventh and Eighth (pp. 11-13), alleges a complete description of the sanitary trunk sewer and the sanitary outlet sewer. They are situated wholly in the County of Westchester. The sanitary trunk sewer is a continuous single line of trunk sewer commencing at the northerly line of the City of White Plains at or near the Bronx River and running thence in a general southerly direction along or near the course of the Bronx River in or through the towns of Greenburgh, Scarsdale, Eastchester and the cities of White Plains, Mount Vernon and Yonkers to or near the southerly line of the City of Yonkers, which is also the southerly line of Westchester County. The said sanitary outlet sewer connects with the said sanitary trunk sewer at the southerly end of such sanitary trunk sewer near the southerly line of the City of Yonkers and runs thence westerly through the City of Yonkers near the southerly line of said city, into the Hudson River. Such sanitary outlet sewer is a single continuous line of sewer excepting for a distance of 634 feet where it is a double line. It consists of a sewer tunnel throughout most of its length as it passes under two high ridges of land. It is only for a short distance in the Tibbetts Valley that it is near the surface (Complaint, Seventh, p. 11).

The sanitary trunk sewer is composed of five sections of an aggregate length of a trifle less than eleven and three-quarters miles. The sanitary outlet sewer is composed of two sections of an aggre-

gate length of a trifle over three miles. The total length of the sanitary trunk sewer and the sanitary outlet sewer is a trifle less than fourteen and three-quarters miles. The description of such sections and the length in feet and size of sewer are all set forth (Complaint, Eighth, pp. 11-13).

The sanitary trunk sewer and the sanitary outlet sewer are limited in their use to house drainage only, there being no drainage connection provided for surface water. Previously existing drainage systems for street gutters and surface water generally have been continued independently. The grade of such sanitary trunk sewer is continuously down grade from the northerly end thereof to its southerly end, where it joins the sanitary outlet sewer, and the grade of the sanitary outlet sewer is continuously down grade from that point to the Hudson River outfall, its terminus, where it drains into the Hudson River. There are no pumping stations and sewage flows throughout said sanitary trunk sewer and said sanitary outlet sewer by gravity only (Complaint, Ninth, p. 13).

The topography of the part of Westchester County through which said sanitary trunk sewer and said sanitary outlet sewer run is alleged in the Tenth paragraph of the complaint (pp. 13, 14). Rising sharply from the Hudson River to the east in Westchester County, a high ridge of land runs close to such river north and south and approximately parallel to the Hudson River. Easterly from such ridge the land slopes down into the valley called at its southerly end Tibbetts Valley, where the property of the plaintiff is located. Easterly from Tibbetts Valley the land rises sharply to another ridge running north and south and

approximately parallel to the first ridge above described. Easterly from such second ridge the land slopes down to the Bronx Valley, through which the Bronx River flows in a southerly direction into the East River. Easterly from the Bronx Valley there is a third ridge running also approximately north and south. The natural drainage of the Bronx Valley between said second and third ridges is southerly into the East River, into which the Bronx River running through the Bronx Valley empties. The natural drainage of the Tibbetts Valley is in a southerly direction into the Harlem River, into which the Tibbetts Brook, which runs through Tibbetts Valley, empties at a point easterly and not far distant from the point of connection between the Harlem River and the Hudson River (Complaint, Tenth, pp. 13, 14).

There is no natural drainage connection between the Bronx Valley and the Tibbetts Valley, such valleys being separated along their entire length by the second ridge above described (Complaint, Eleventh, p. 14).

The sanitary outlet sewer is necessary for the use of the sanitary trunk sewer as it is the only outlet for that sewer. Such sanitary outlet sewer runs from the point of connection with the sanitary trunk sewer westerly under the second ridge above described and at a great depth below the surface of such ridge, too deep for any sewer connections to be made west of the point where the sanitary trunk sewer connects with the sanitary outlet sewer, until the latter reaches the Tibbetts Valley. It continues to run westerly toward the Hudson River across Tibbetts Valley and under the first ridge above described and at a great depth below the surface of such ridge, to a point where

it terminates and empties into the Hudson River. It is only in Tibbetts Valley that any sewer connections for the Tibbetts Valley watershed or drainage area can be made to this sanitary outlet sewer (Complaint, Twelfth, p. 14).

There can be no sewer connections made for the property situated in Tibbetts Valley to the sanitary trunk sewer which runs through the Bronx Valley, both because such lands in Tibbetts Valley are separated from the sanitary trunk sewer by the second ridge above described, which rises from 200 to 260 feet above the level of Tibbetts Brook, running through Tibbetts Valley, and because the grade of the sanitary outlet sewer and the sanitary trunk sewer rises from Tibbetts Valley all the way to the northerly end of the sanitary trunk sewer in North White Plains (Complaint, Thirteenth, p. 14).

The only use that can be made for property situated in Tibbetts Valley of the sanitary outlet sewer is by the connection of a trunk sewer about four miles in length, which has not yet been built, to connect with the sanitary outlet sewer at or near the easterly end of Section VII of said sanitary outlet sewer; and the Lincoln Park section of Tibbetts Valley, which is the southeasterly part of said valley, has a trunk sewer already connected to Section VI of the sanitary outlet sewer at a point about 300 feet easterly from the lower end of Section VI and that distance easterly from the connection of Section VII. The property in Tibbetts Valley which can use such sewer connection is only about 2,500 acres in extent. Thus, the only part of such sanitary outlet sewer that could be used for sewer purposes by the property in Tibbetts Valley is a partial use of Section VII, approximately

7,968 feet long, and a partial use of the additional 300 feet at the end of Section VI for the Lincoln Park section of Tibbetts Valley only. Such partial use is only for a trifle over one and a half miles of the sanitary outlet sewer out of three miles of the sanitary outlet sewer. The part that cannot be used for said Tibbetts Valley property is all of the sanitary trunk sewer, eleven and three-quarters miles in length, and the mile and a half additional of the sanitary outlet sewer. The partial use that can be made of the mile and a half of the sanitary outlet sewer, which is all that can be used at all by the Tibbetts Valley property, is in addition to its use as the outlet sewer for the whole of such sanitary trunk sewer, eleven and three-quarters miles in length, running through a populous section of Westchester County and designed for and used as the drainage system of the greater part of the Bronx Valley (Complaint, Fourteenth, pp. 14, 15).

No trunk sewer has been built to drain the Tibbetts Valley property, excepting only a small part thereof situated in the said Lincoln Park section of Tibbetts Valley. To construct such a trunk sewer in Tibbetts Valley would cost upwards of \$300,000. The property situated in Bronx Valley has thus a completed trunk sewer to which service sewers may be directly connected, while the property in Tibbetts Valley (with the exception only of the said Lincoln Park section) has no trunk sewer whatsoever and can make no use whatsoever of any part of such sanitary outlet sewer until such a trunk sewer is constructed (Complaint, Fifteenth, p. 15).

Notwithstanding the partial use that only can be made for property in Tibbetts Valley of a small

part of such sanitary outlet sewer and no part of such sanitary trunk sewer, all of the property in Tibbetts Valley is assessed for the whole cost of both the sanitary outlet sewer and the sanitary trunk sewer, fourteen and three-quarters miles in length, at the same rate as the property in Bronx Valley, without any distinction or difference whatsoever (Complaint, Sixteenth, p. 15).

The assessments for the expense of constructing and maintaining the sanitary trunk sewer and the sanitary outlet sewer are required by said Act as amended to be and are based wholly upon the assessed valuations for purposes of general taxation upon the property within the assessment area described in the Act as amended. There is no power conferred by the Act as amended to reduce assessments upon property in any part of such assessment area which is not equally benefited with property in any other part of such assessment area. Each property throughout said assessment area is assessed at its assessed value for purposes of general taxation, irrespective of the degree of benefit derived from the construction of the sanitary trunk sewer and the sanitary outlet sewer (Complaint, Seventeenth, p. 15).

The Act as amended fixes the area of assessment by an amendment in the year 1917, twelve years after the passage of the original Act and five years after the completion of the sanitary trunk sewer and sanitary outlet sewer which took place in 1913. The original Act contained two fundamental provisions. One limited the total cost to \$2,000,000 and provided that no contracts shall be let for one section until estimates have been received for all sections so that in no event shall the limit of cost be exceeded. The other provided for the fixing of

the area benefited by the Commissioners appointed under said Act and granting a hearing to all property owners as to the plans submitted and the area benefited and that contracts shall not be let nor work begun under the final map or plan, adopted after such hearing, until such final map or plan shall have been approved by the State Engineer and the State Department of Health. Both of these fundamental provisions of the original Act were changed by the amendments thereto, so that the total cost is in excess of \$3,250,000 and the area of benefit is fixed by description in amendments to the original Act and the property owners deprived of any notice or hearing as to whether their property was properly included in such area of benefit (Complaint, Eighteenth, p. 16).

Such assessments are upon the valuation of the property situated within said area of assessment for purposes of general taxation and improved property is assessed at the value of the land with the improvements thereon, so that such assessments are entirely disproportionate to the benefits upon adjoining properties that can make the same use of such sewer, depending entirely upon whether one property has a building on it and the other property is vacant, and depending further upon the values of the particular buildings upon such lots (Complaint, Nineteenth, p. 16).

Such Act as amended purports to require the Board of Supervisors of the County of Westchester, in each calendar year, to adopt a budget for the Bronx Valley sanitary sewer district and to determine the aggregate amount of the tax to be collected for such district for such year, and in such budget to include certain items specified in such Act which are unconstitutional and unlawful and a depriva-

tion of the plaintiff's property without due process of law, including the cost of all litigation now or hereafter incurred, and to provide a contingent fund to meet deficiencies in revenues which requires persons who have paid the amounts assessed against their properties to pay further sums to make up deficiencies arising from the non-payment of such assessments by owners of other property situated in said district. That the sum assessed against the plaintiff's property for 1918 includes such unconstitutional and unlawful items (Complaint, Twentieth, p. 16).

Such Act as amended purports to provide that in the City of Mount Vernon the assessments for the Bronx Valley sewer shall not be levied or assessed against the lots or parcels of land situate within such Bronx Valley sanitary sewer district, but that the aggregate amount of such tax shall be levied and assessed upon all the property real and personal liable to general taxation within said city and not exempt therefrom and thereby this plaintiff is denied the equal protection of the laws and an unconstitutional and illegal discrimination is made against plaintiff's said property. The area of the Bronx Valley sewer district within the City of Mount Vernon is only a small part of the area of the lands within said city (Complaint, Twenty-first, p. 17).

The plaintiff has been illegally assessed upon its said property described in the complaint in the sums there set forth for the year 1918. The said illegality forms no part of the record and can be established only by extrinsic evidence (Complaint, Twenty-second, p. 17).

Such Act as amended which included all of plaintiff's said property in the area for assessments pro-

vided therein, is in violation of the Fourteenth Amendment of the Constitution of the United States of America and is in violation of Section 6 of Article I of the Constitution of the State of New York, in that it deprives plaintiff of its property without due process of law and without just compensation and denies to it the equal protection of the law (Complaint, Twenty-third, p. 17).

The said assessments are a cloud upon the title to plaintiff's said property and greatly depreciate the market value thereof and interfere with the sale of said property and the plaintiff has no adequate remedy at law (Complaint, Twenty-fourth, p. 17).

The complaint demands judgment that all of said assessments against the plaintiff's said property be adjudged void and cancelled of record and that the City of Yonkers, its officers, agents and servants, be restrained from collecting such assessments and for such other and further relief as may be just (Complaint, p. 17).

All of the foregoing facts are admitted by the demurrer.

While the amount of the assessments for 1918 on the separate lots owned by the plaintiff is not large in most instances, it should be borne in mind that the Act as amended provides for assessments for a period of seventy-five years, the last fifty of which shall include sums sufficient to retire the bonds issued for the cost of the entire work.

The Act and Amendments Thereto.

The statute directly in question, under which the assessments involved in this action were levied, is Laws of the State of New York, 1917, Chapter 646, which supplements the original Act, Laws of 1905, Chapter 646, as amended up to that time. The material provisions of such supplemental Act are all printed in the appendix to this brief, *infra*, pp. 81-91). Such provisions of the original Act, as amended up to 1917, as are material are also set forth in the appendix, *infra*, pp. 74-80.

The original Bronx Valley Sewer Act is Chapter 646 of the Laws of the State of New York of 1905. It has been amended fourteen times. The complete list of amendments is set forth in the complaint, paragraph Sixth (p. 11). The original Act is a long and complicated one covering many pages. It is entitled "An Act to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the County of Westchester and to provide means for the payment therefor."

The following is a summary of its principal provisions, as amended to 1917, omitting details and provisions immaterial to this action. It names Commissioners under such Act authorizing them to acquire real estate and provides that they shall "consider the construction, operation and maintenance of the said sanitary sewer and outlet sewer, their principal function and duty and all other powers granted to them by this act to be subordinate and incidental thereto." It further provides that the Commissioners shall carry out the powers and provisions of this Act and that the total expenditures made or liabilities incurred for the con-

struction, operation and maintenance of said sewer and outlet shall not exceed \$2,000,000 (increased by successive amendments to \$3,866,170—Laws 1914, Chap. 487), and they are prohibited from contracting for any greater expenditure (Sec. 1, Appendix, *infra*, pp. 74, 75). It shall be the duty of the Commissioners to adopt the survey already made by the Commission formed for that purpose of such lands within the sewerage area of the proposed sewers and to make such amendments thereto as said Commissioners may deem necessary or as may be required by the provisions of this Act for the construction or completion of a sanitary trunk sewer from the northerly line of the town of White Plains, at or near the Bronx River, in the County of Westchester, in or through the towns of White Plains, Greenburgh, Scarsdale, Eastchester and the cities of Mount Vernon and Yonkers to or near the southerly line of the City of Yonkers; and of an outlet sanitary sewer from thence westerly through the City of Yonkers into the Hudson River. The map and amendments thereto shall remain on file in the office of the Commissioners and be open to public inspection and shall be the plan according to which the said sewers and appurtenances shall be constructed subject to changes thereafter made. Copies are to be filed with the Supervisors of the County of Westchester and in the County Clerk's office (Sec. 2, Appendix, *infra*, pp. 76-78).

“When said maps shall be entirely completed and amended by the Commissioners aforesaid and filed as aforesaid, showing the area to be benefited, the Commissioners shall fix a time and place within the County of Westchester, where all property owners shall have an opportunity to be heard, as to the

plans submitted and the area benefited." Notice of such hearing shall be given.

After such hearing should the Commissioners determine on any change in the plans or map *or area benefited*, a new map or plans shall be filed (Sec. 2, Appendix, *infra*, pp. 77-78). This first map of the benefit area was wiped out by Laws of 1917, Chapter 646 (Appendix, *infra*, pp. 81-83). "The construction and maintenance of said sewers and the works authorized by this act are hereby declared to be for a public purpose" (Sec. 2, Appendix, *infra*, p. 78).

Section 14 (as amended by Laws 1914, Chap. 487) provides for the issue of bonds to pay for the improvement. "Such bonds and interest to be payable by their terms by assessment and levy of taxes upon the real property laid out on the plan and map approved as set forth in section two of this act as modified by this act, and not by levy upon the entire property in the County of Westchester * * *." One-fiftieth of the entire issue thereof to be payable twenty-five years from the time the first of said bonds are issued; and thereafter one-fiftieth thereof shall be payable in each year until the whole issue of said bonds shall be fully paid (Appendix, *infra*, pp. 79, 80).

Section 18 (as amended by Laws 1915, Chap. 655) provides for the connection of sewers and the making of ordinances, rules and regulations as to making connections "*and to exclude therefrom all surface drainage except sewage*" (Appendix, *infra*, p. 80).

"If any section, part, provision, or clause in this act shall for any reason be held invalid, such in-

validity shall not affect the validity of any other section, part, provision or clause of this act" (Sec. 21, Appendix, *infra*, p. 80).

By Chapter 550 of the Laws of 1912 a provision was added to Section 3 of the original Act to the effect that *it shall be the duty of the Commissioners to prepare a map showing the lands included within the sewerage area of said proposed sewers, which map shall remain on file in the office of the Commissioners and be open to public inspection.* They shall fix a time and place when all property owners shall have an opportunity to be heard and make objection as to the area benefited as shown on said map. Notice of such hearing shall be given. After such hearing should the Commissioners determine on any change as to the area benefited they shall cause the map showing the area benefited to be amended in accordance therewith and file the same in the office of the Supervisors of Westchester County, and a certified copy with the County Clerk. *"When completed and filed as above provided such map shall supersede any map or maps now on file showing the lands within such sewerage area, and have the same force and effect as if prepared and filed in accordance with the provisions of section two of this act"* (Appendix, *infra*, pp. 78, 79). This second map of the benefit area was wiped out by Laws 1917, Chap. 646, Appendix, *infra*, pp. 81-83).

Chapter 646 of the Laws of 1917, the Act particularly in question here, is an act to *supplement* the original act as amended (see Appendix, *infra*, pp. 81-91). It begins with the following recitals and provisions:

"Whereas, pursuant to the provisions of this act and the amendments thereto to

which this act is a supplement a sanitary trunk sewer in the Bronx Valley in the County of Westchester and an outlet sanitary sewer to the Hudson River through the City of Yonkers, in said County, have been constructed and are now being maintained and operated, and

Whereas, as provided in said act as amended the Commissioners appointed by said act did adopt and cause to be filed a map or plan showing the area to be benefited, and

Whereas, such map or plan includes certain land which in equity should not be included in the benefited area and excludes certain land which in equity should be included therein, and it is therefore deemed necessary to fix and determine the area benefited by such trunk sewer and outlet sewer, * * *

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The district or area in the County of Westchester, and including therein all or any part of the cities of Yonkers, Mount Vernon and White Plains and the towns of Eastchester, Scarsdale and Greenburgh, hereinafter particularly described, shall be known as 'The Bronx Valley sanitary sewer district' and all lots or parcels of land within such district or area are declared to be benefited by the construction and maintenance of the trunk sewer and outlet sewer constructed and maintained under the provisions of the act and the amendments thereto to which this act is a supplement and, except as hereinafter provided, shall be subject to the taxes or assess-

ments imposed by this act to pay the cost of the construction of such sewer and of maintaining and operating the same and to pay all indebtedness with interest thereon incurred in the construction, maintenance and operation thereof, or in connection therewith, * * *. The district or area to constitute the 'Bronx Valley sanitary sewer district' is described as follows:" (Appendix, *infra*, pp. 81-83).

(Then follows a description by metes and bounds, covering thirty-one pages.)

(This Act was amended by Laws of 1918, Chapter 535, by correcting the description by metes and bounds so as to include about six pages of such description omitted from the Act quoted above, and correcting the assessments already imposed accordingly.)

Section 2 of this Act provides that "*the annual assessment rolls in each city or town in whole or in part within the Bronx valley sanitary sewer district shall be used for the purpose of the Bronx valley sanitary sewer district tax.*" The details of how these assessment rolls are to be made up are stated. Such assessment rolls shall "contain a separate column for the extension of such Bronx valley sanitary sewer district tax or assessment against all lots or parcels of land within said Bronx valley sanitary sewer district as are shown upon such assessment rolls as subject to the tax provided by this act and as herein provided" (Appendix, *infra*, pp. 83-85).

"Section 3. At the times and in the manner provided by law, the assessment rolls of each city or

town in whole or in part within the Bronx valley sanitary sewer district shall be open to inspection, and the assessor of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided for in this act" (Appendix, *infra*, p. 85).

Section 4 provides for equalization of values between the assessment rolls of the different towns and cities (Appendix, *infra*, pp. 85, 86).

Section 5 provides that if it shall be made to appear to the Board of Supervisors upon verified petition of the assessors of any city or town in said district that real estate in said city or town not within said district is shown upon the assessment rolls to be within the district the Board of Supervisors may correct the assessment rolls and conversely if there is real estate within the district not shown on the assessment rolls to correct such rolls after notice to and hearing of such property owners (Appendix, *infra*, pp. 86, 87).

Section 6 provides that it shall be the duty of the Supervisors of Westchester County in each calendar year to adopt a budget for the Bronx Valley sanitary sewer district and to determine the aggregate amount of the tax to be collected for such district for such year. The details of what such budget shall provide are stated. They include cost of maintenance, operating and repair of the sewer; to pay all judgments against the Bronx Valley sanitary sewer district or against the County of Westchester in anywise arising out of the construction, operating or maintenance of the sewer; "to pay the cost of all litigation now or hereafter incurred"; to pay

all interest on bonds or certificates of indebtedness, "and all other indebtedness properly chargeable to such district under the provision of any present or future laws"; to provide for the payment of all bonds falling due; "*to provide a contingent fund to meet deficiencies in revenue*" (Appendix, *infra*, pp. 87, 88).

Provision is then made for apportioning to and levying against the several towns and cities the amount of such tax (Sec. 7) which shall be paid by the cities and towns (Sec. 8, Appendix, *infra*, pp. 88, 89).

Section 11 provides for the entering of such taxes upon the assessment rolls against the property owners (Appendix, *infra*, pp. 89, 90).

Section 12 provides that the tax of the Bronx Valley sanitary sewer district shall be part of the tax upon the respective lots or parcels of land against which it has been extended on the assessment rolls and shall be collected as such and as one tax except that the receiver of taxes may in his discretion receive payment of either the annual tax or the Bronx Valley sanitary sewer district tax separately (Appendix, *infra*, p. 90).

Section 12 further provides that this tax shall become a lien on the same date as the annual tax becomes a lien and shall be levied, corrected, enforced and collected by the same proceedings, at the same time, under the same penalties, and the lien thereof may be sold or foreclosed as the general tax (Appendix, *infra*, p. 90).

Section 13 provides: "If any portion of this act shall be declared unconstitutional, the remainder

shall stand, and the portion declared unconstitutional shall be excluded" (Appendix, *infra*, p. 90).

Chapter 82 of the Laws of 1918 amends Chapter 646 of the Laws of 1917, in Sections 7, 11 and 12 and adds two new sections, 14 and 15. Sections 7, 11 and 12 are amended as to the dates and as to when such assessments shall become a lien and the interest penalty for non-payment and the foreclosure of such lien.

Section 14 as amended, provides: "Anticipated payments made by any city or town to the county treasurer, for which the city or town shall not have been reimbursed by taxes which it is entitled to retain shall be forthwith refunded by the county *in case the provisions of this act authorizing or requiring anticipated payments by cities and towns are unconstitutional * * * or in case such payments were unauthorized by reason of any constitutional or other defect in this act or in the proceedings thereunder,*" etc., "but in any such event, the county shall be entitled to be reimbursed by the district for the amounts so paid to any city or town to the extent that taxes therefor may be lawfully imposed and collected under this act or any amendment thereof" (Appendix, *infra*, pp. 90, 91).

Section 15 provides that: "In any action or special proceeding in a court of record involving the constitutionality of this act, or the status or boundaries of the Bronx Valley sanitary sewer district, or the validity or amount of any assessment or tax imposed by this act, *the County of Westchester shall be a necessary party*" (Appendix, *infra*, p. 91).

POINT I.

This plaintiff-in-error has a constitutional right to notice and hearing as to the apportionment of the assessments upon its property and the act, as amended, in fixing those burdens by general rule without notice and hearing and without regard to special benefit is unconstitutional.

The Bronx Valley Sewer Act as amended by Chapter 646 of the Laws of 1917 provides for an annual assessment for the purpose of such Act against all of the property located within the area described by metes and bounds in the statute. Such assessments are to continue annually for a period of seventy-five years, the last fifty of which are to include one-fiftieth of the sums required to pay the bonds issued for the work.

The assessments are to be levied upon the assessed value of each parcel of land, and the buildings thereon if improved, for purposes of general taxation. The assessment rolls for such purposes of general taxation are to be used and the exact proportion of such total sum to be raised extended against each parcel within the area described in the proportionate amount that the total assessment for the year bears to the total assessed value of all of the parcels within the assessment area.

Thus a fixed rule is established by the provision of this amended Act by which an equal rate of assessment is applied against each property without regard to differences of location or benefit.

The assessment is not apportioned in accordance to benefit, but by this fixed rule which treats each parcel in this large area, containing many square miles, exactly alike. No notice or hearing what-

ever is provided for the property owners in regard to any apportionment of the assessments against their property. On the contrary, the law provides a fixed rule, from which no departure is authorized, of an exactly equal rate of assessment upon all properties within the area.

The provisions of the amended Act, Chapter 646, Laws of 1917, accomplishing such results, are as follows (see also *supra*, pp. 23-28, and Appendix, *infra*, pp. 81-91) :

Section 1 of that Act provides a district or area in the County of Westchester described in such section by metes and bounds which shall be known as "The Bronx Valley Sanitary Sewer District," "and all lots or parcels of land within such district or area are declared to be benefited by the construction and maintenance of the trunk sewer and outlet sewer constructed and maintained under the provisions of the act and the amendments thereto to which this act is a supplement, and, except as hereinafter provided, shall be subject to the taxes or assessments imposed by this act to pay the cost of the construction of such sewers and of maintaining and operating the same and to pay all indebtedness with interest thereon incurred in the construction, maintenance and operation thereof, or in connection therewith." Then follows an exception as to the City of Mount Vernon (Appendix, *infra*, pp. 81-83).

Section 2 of that Act provides that "*the annual assessment rolls in each city or town in whole or in part within the Bronx Valley Sanitary Sewer district shall be used for the purpose of the Bronx Valley Sanitary Sewer district tax,*" and that such

assessment rolls shall "contain a separate column for the extension of such Bronx Valley Sanitary Sewer district tax or assessment against all lots or parcels of land within such Bronx Valley Sanitary Sewer district as are shown upon such assessment rolls as subject to the tax provided by the act and as herein provided" (Appendix, *infra*, pp. 83-85).

Section 6 provides that the Board of Supervisors shall annually fix the aggregate amount of such tax to be raised, and Section 7 (as amended by Chapter 82 of the Laws of 1918) provides that it shall be the duty of the Board of Supervisors "to apportion to and levy against the several towns and cities within the Bronx Valley Sanitary Sewer district the amount of said tax, according to the equalized value of the real estate in such towns or cities appearing upon the assessment rolls as situated within the limits of such Bronx Valley Sanitary Sewer district" (Appendix, *infra*, pp. 87, 88).

Section 11 (as amended by Chapter 82 of the Laws of 1918) provides in part:

"Sec. 11. Forthwith upon the receipt and filing with the supervisor of each town and the city clerk of each city of the certified copy of the resolution of the board of supervisors apportioning the Bronx Valley Sanitary Sewer district tax, the amount of such tax apportioned to such city or town, as the case may be, shall be apportioned and extended in the separate column to be provided in the assessment rolls for that purpose against the lots or parcels of land in such city or town which shall appear on the assessment rolls to be within such Bronx Valley Sanitary Sewer district and liable to the

taxes therefor as provided in this Act * * *

(Appendix, *infra*, pp. 89, 90).

It is true that Section 3 of this amended Act, Chapter 646 of the Laws of 1917, provides that such assessment rolls shall be open for inspection and the assessors of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided in this Act. But there is no provision for either a notice to or hearing of the property owners as to the apportionment of the tax, which must be in accordance with the unbending rule laid down in the statute. Such Section 3 is as follows:

"Sec. 3. At the times and in the manner provided by law, the assessment-rolls of each city or town in whole or in part within the Bronx Valley sanitary sewer district shall be open to inspection and the assessors of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided for in this Act."

Section 5 of this amended Act, Chapter 646 of the Laws of 1917, contains a provision to the effect that if it shall be made to appear to the Board of Supervisors upon verified petition of the assessors of any city or town in said district that real estate in said city or town not within said district is shown upon the assessment rolls to be within the district the Board of Supervisors may correct the assessment rolls; and conversely if there is real estate within the district not shown on the assessment rolls to correct such rolls after notice to and hearing of such property owners.

The provision of this Section 5 relating to a hearing as to property situated within the district, but omitted from the assessment rolls, is as follows :

"Sec. 5. * * * The board of supervisors shall give such person or corporation (owners) an opportunity to be heard, and after such hearing if the board of supervisors shall find that the property so referred to in such petition lies within the Bronx Valley sanitary sewer district, it shall cause the fact to be indicated upon the assessment rolls" (Appendix, *infra*, pp. 86, 87).

It should be observed that such hearing upon petition of the assessors of any city or town is solely as to such parcels of land as are claimed to have been left out of the assessment rolls, although situated in fact within the area described by metes and bounds in the statute. Thus the hearing does not relate in any way to the apportionment of the assessment between the various property owners whose lands are situated within the area but merely relates to the question of whether the particular parcel involved is within or without the bounds of the area described in the Act.

It thus appears that this statute fails to provide for any notice to or hearing of property owners as to any apportionment of the tax upon the various parcels of land included in the area of assessment described by metes and bounds by the Legislature. On the contrary, the Act itself fixes an exactly equal rate of assessment upon each parcel throughout the area based on its assessed value each year for lands and buildings thereon for purposes of general taxation.

This, we submit, renders the Act unconstitutional as in violation of the due process of law provision

of the Fourteenth Amendment to the Federal Constitution.

The Appellate Division of the Supreme Court of the State of New York in their opinion below in the case at bar, 193 (N. Y.) App. Div., 433, 437 (Record, p. 27), said:

"It is true that a property owner has the constitutional right to be heard upon the apportionment of the tax as between him and other property owners within the district. This apportionment is usually delegated to some commission or board which has *quasi* judicial power, upon the exercise of which the property owner is entitled to an opportunity to be heard. But in this case, by adopting the assessment rolls of local assessors, the right to be heard as to the proper apportionment is preserved, not only by necessary implication, but by Section 3 of the Act."

Reference to Section 3, quoted *supra*, shows, however, that it contains no provision for notice to or hearing of the property owners *as to the apportionment of the tax against them*, but merely a general provision about hearing and determining all complaints in relation to the assessments for the tax provided for in this Act.

As the statute contains mandatory provisions, set forth above, for the imposition of equal taxes upon all property on the basis of the assessments for general taxation, it prohibits any action by the assessors which would apportion these taxes according to benefit.

The reference to an implied right to apportion such taxes, we think, wholly disregards the express

language of the act requiring the extension of the taxes ratably against each property within the district on the basis of its assessment for general taxation.

We submit, therefore, that the Appellate Division, while conceding the rule here contended for, is in error in stating that Section 3 provides for such notice and hearing as to the apportionment of the tax or that such a right is preserved by necessary implication.

Even in the case of general taxation an *effective* hearing as to the amount of the assessments upon which the tax rate is computed is a constitutional right. It was so held in a recent case in the United States Supreme Court where a State statute provided for an arbitration to determine a disputed assessment for general taxation but fixed a time limit of ten days within which the decision of the arbitrators must be filed and the arbitration failed because two of the three arbitrators could not agree upon an award though all thought the assessment too high.

Turner v. Wade, 254 U. S., 64.

See also:

Central of Georgia Ry. Co. v. Wright, 207 U. S., 127.

A leading case relied on by the defendant-in-error is *Spencer v. Merchant*, 100 N. Y., 585, aff'd 125 U. S., 345, which held that the Legislature might fix the aggregate amount of tax to be raised and the area of assessment upon which it should be imposed, but Mr. Justice Gray, in the opinion, 125 U. S., 345, says, at pages 355 and 356:

"If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Mr. Justice Gray, at page 355, also quotes from the opinion of Judge Finch below (100 N. Y., 585, at p. 589), as follows:

"The land-owners were given a hearing, and so there was no constitutional objection in that respect. Nor was that hearing illusory. It opened to the land-owner an opportunity to assail the constitutional validity of the act under which alone an apportionment could be made, and that objection failing, it opened the only other possible questions, of the mode and the amounts of the apportionment itself. We think the act was constitutional."

Mr. Justice Gray further says, at page 357:

"The statute of 1881 afforded to the owners notice and hearing upon the question of the equitable apportionment among them of the sum directed to be levied upon all of them, and thus enabled them to contest the constitutionality of the statute; and that was all the notice and hearing to which they were entitled."

In the case at bar the Legislature not only has provided that the whole cost and maintenance of such sewer system shall be assessed against all of the property within the area described by metes and bounds in the Act, but it has gone further and declared that there shall be no apportionment of the assessments whatever between the different

properties in accordance with differences of location or benefits but that all should be assessed at the same rate and this without notice to or hearing of the property owner as to such apportionment. As the statute fixes the rule of an equal rate of assessment against all property within the area, a notice to or hearing of the property owner as to *such apportionment* would be not only an empty form, but a contradiction in terms.

In *Matter of Trustees of Union College*, 129 N. Y., 308, the limitations upon the rule declared in *Spencer v. Merchant*, *supra*, that the Legislature may fix the area of assessment are clearly pointed out, and that case distinguished, by Finch, J., at page 313:

"The act of 1886 (Chap. 656), again attempts to ratify and confirm the unconstitutional assessments without curing their inherent defect; and both acts are now sought to be sustained upon the doctrine of *Spencer v. Merchant* (100 N. Y. 585, and 125 U. S. 345), as a direct assessment by the legislative authority. That case held that the legislature might fix the aggregate amount of tax to be raised and the area of assessment upon which it should be imposed, but carefully avoided any ruling that the apportionment of the tax among the persons assessed, which fixes the amounts of the several liabilities, and establishes a charge for which the property is held and may be taken, can also be accomplished, without notice or a hearing on the part of the taxpayer. Indeed, the opinions of both Courts assume such notice as a necessity, and the reasons therefor are clear and obvious. In fixing the aggregate sum to be raised and the area of property

which shall pay it, the legislature determines a public question, and upon considerations of the public interest and welfare. The specific rights of any particular individual are not involved, and until they are, he has no right to interfere, except in the general way which is common to every citizen. But when the public questions are settled and the tax comes to be apportioned, a personal liability of the individual and a lien upon his property are initiated, and he has a right then to be heard upon all the questions which affect and determine that liability. His right is to pay no more than his just proportion, and the legislature cannot arbitrarily determine the amount, refusing to the person assessed a reasonable opportunity to be heard. Both of the validating acts are open to this objection. While they were sufficient to cure defects of one character, they were not capable of infusing life into a law which the legislature had no power to make."

In *French v. Barber Asphalt Paving Co.*, 181 U. S., 324, while affirming the rule that the Legislature of a State may fix the area of an assessment, it is pointed out in the opinion, at page 341:

"The right which he (the property owner) thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax he is to pay."

In *Hancock v. Muskogee*, 250 U. S., 454, it is stated that while a legislative enactment fixing the bounds of an assessment area may be made without *previous* notice to the property owner, that "the question of distributing or apportioning the burden

of the cost among the particular property owners is another matter" (see opinion of Mr. Justice Pitney, at page 457, where numerous cases are cited).

The Bronx Valley Sewer Act, however, as shown above, makes no provision for any hearing on the apportionment of the tax. It provides by set rule that all of the property within the area must pay an equal assessment upon the value of each property as improved, as found and assessed for purposes of general taxation. The hearing provided by Section 3 of Chapter 646 of the Laws of 1917, is in no way a hearing on apportionment of the tax, for the provision that "the assessors of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided for in this act" leaves the assessors powerless to pass upon the apportionment of the assessment against particular properties, *for all of the assessments must by the Act itself be fixed by set rule; that is, a proportionate assessment against each property upon the value of the property with the improvements, if any, as fixed by the assessors for purposes of general taxation.*

This so-called hearing is thus not "*a hearing upon the question of what is termed the apportionment of the tax, i. e., the amount of the tax which he is to pay,*" which is held by the United States Supreme Court to be a constitutional right of the property owner in *French v. Barber Asphalt Paving Co.*, *supra*.

The Act requires the mechanical extension of the equal assessments based on the assessed value of each parcel of land, with any improvements thereon, for purposes of local taxation. It is an assessment fixed not after a hearing in proportion to

benefits "but in blind obedience to a rule that requires the result" (*infra*, p. 44).

The defendant-in-error contended below that this Act in question provides for a hearing as to the value of the property for purposes of general taxation and that such a hearing is in effect an apportionment because it is in reference to value instead of the tax based upon that value which is to be computed at a pro rata amount on all property within the area.

As the sewer assessments are fixed as a pro rata tax based on the assessed values for purposes of general taxation it is difficult to see how a change in the assessed value for purposes of general taxation would be any *apportionment* of the special sewer assessment. Surely it would be no ground for changing the assessment for general taxation to say that a sewer assessment which operated unjustly was to be computed pro rata upon the assessments for general taxation.

If the assessment for general taxation should be corrected and reduced the sewer assessment is still computed pro rata upon a *correct* assessment for purposes of general taxation and is not apportioned at all between lands differently situated and receiving grossly unequal benefits from the improvement.

There is, we repeat, no notice or hearing upon the *apportionment* of these sewer assessments provided in the Act in question.

POINT II.

The act as amended is unconstitutional in that it deprives the plaintiff-in-error of its property without just compensation and without due process of law because it assesses such property equally with all other property within the assessment area for the whole cost of the sanitary outlet sewer and the whole cost of the sanitary trunk sewer, whereas the property of the plaintiff-in-error can make no use whatever of such sanitary trunk sewer eleven and three-quarters miles in length and only a partial use of about one-half of the length of the sanitary outlet sewer about three miles in length. Such partial use even as to most of its property can only begin upon the construction of a trunk sewer in the Tibbetts Valley about four miles in length and costing over \$300,000.

All of the facts asserted in the above point are established by the allegations of the complaint and are set forth in the foregoing statement of facts.

That there can be no use made by the property of the plaintiff-in-error of the sanitary trunk sewer is fully alleged in the Thirteenth paragraph of the complaint (p. 14). The only use that can be made of the sanitary outlet sewer is alleged in paragraph Fourteenth of the complaint (pp. 14, 15). That such partial use can only be made upon the construction of a trunk sewer about four miles in length in the Tibbetts Valley costing upwards of \$300,000 and for which no provision has yet been made is alleged in paragraph Fifteenth of the complaint (p. 15). The property of this plaintiff-in-error is assessed for the whole cost of both the sani-

tary outlet sewer and the sanitary trunk sewer at the same rate as the property in Bronx Valley without any distinction or difference whatever. Such assessments by the provisions of the Act as amended are required to be and are based solely upon the assessed valuation of such property for the purposes of general taxation (Complaint, Sixteenth and Seventeenth, p. 15; Amendment, Chap. 646 of the Laws of 1917, Secs. 2 and 6, and Secs. 7 and 11, as amended by Chap. 82, Laws of 1918; Appendix, *infra*, pp. 83-90).

The assessments involved in this suit are for 1918 (p. 3). As no trunk sewer in the Tibbetts Valley has been built or provided for, no use whatever of any part of such sanitary outlet sewer has been made or can be made by any of the property of the plaintiff-in-error excepting only the small portion situated in the Lincoln Park section.

In *Gast Realty & Investment Company v. Schneider Granite Company*, 240 U. S., 55, it is held that a municipal ordinance which, in creating the taxing district upon which, under the city charter, three-fourths of the cost of paving a street is to be assessed according to area, established a boundary line that, after running for some distance on a line not 100 feet back from the street, jumped to nearly 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet and 240 feet away, violates the Fourteenth Amendment to the Constitution, where such differences were not based upon any consideration of difference in benefits conferred, but were established mechanically, in obedience to the criteria that the charter directed to be applied.

Mr. Justice Holmes says, at pages 58-59-60:

"The legislature may create taxing districts to meet the expense of local improvements, and may fix the basis of taxation without encountering the 14th Amendment unless its action is palpably arbitrary or a plain abuse. *Houck v. Little River Drainage Dist.*, 239 U. S. 254, 262. The front-foot rule has been sanctioned for the cost of paving a street. In such a case it is not likely that the cost will exceed the benefit, and the law does not attempt an imaginary exactness, or go beyond the reasonable probabilities. *French v. Barber Asphalt Paving Co.*, 181 U. S. 324; *Cass Farm Co. v. Detroit*, 181 U. S. 396, 397. So in the case of a square bounded by principal streets, the land might be assessed half way back from the improvement to the next street. *Louisville & N. R. Co. v. Barber Asphalt Paving Co.*, 197 U. S. 430. But, as is implied by *Houck v. Little River Drainage Dist.*, if the law is of such a character that there is no reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact. *Martin v. District of Columbia*, 205 U. S. 135, 139. * * * The ordinance, following the charter as construed, established a line determining the proportions in which the tax was to be borne that, after running not a hundred feet from the street, leaped to near 500 feet when it encountered such a tract, and on the opposite side of the street was 150 and 240 feet away. The differences were not based upon any consideration of difference in the benefits conferred, but were established mechanically in obedience to the criteria that the

charter directed to be applied. The defendants' case is not an incidental result of a rule that, as a whole and on the average, may be expected to work well, but of an ordinance that is a farrago of irrational irregularities throughout. It is enough to say that the ordinance following the orders of the charter is bad upon its face as distributing a local tax in grossly unequal proportions, not because of special considerations applicable to the parcels taxed, but in blind obedience to a rule that requires the result. And it cannot be said that the ordinance as a whole may be regarded as an individual exception under a rule that promises justice in all ordinary cases. The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the State Courts." (Italics ours.)

In *Kansas City Southern Ry. Co. v. Road Improvement District No. 6*, 256 U. S., 658, in holding an assessment unconstitutional, the rule was restated by Mr. Justice McReynolds at pages 660 and 661 as follows:

"The settled general rule is that a state legislature 'may create taxing districts to meet the expense of local improvements and may fix the basis of taxation without encountering the Fourteenth Amendment unless its action is palpably arbitrary or a plain abuse.' *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S. 55; *Honek v. Little River Drainage District*, 239 U. S. 254, 262. Ordinarily, the levy may be upon lands specially benefited according to value, position, area, or the front foot rule" (citing numerous cases).

"If, however, the statute providing for the tax is 'of such a character that there is no

reasonable presumption that substantial justice generally will be done, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred, the law cannot stand against the complaint of one so taxed in fact.' *Gast Realty Co. v. Schneider Granite Co.*, supra. * * * Benefits from local improvements must be estimated upon contiguous property according to some standard which will probably produce approximately correct general results."

See also:

Thomas v. Kansas City Southern Ry. Co.,
277 Fed., 708.

Property not benefited may not be constitutionally assessed for a drainage improvement.

Myles Salt Company, Limited, v. Board of Commissioners of the Iberia & St. Mary Drainage District, 239 U. S., 478, 484, 485.

As most of the property of the plaintiff-in-error cannot use the sanitary outlet sewer until a trunk sewer is built in the Tibbetts Valley, such property has received no benefit and yet it has been assessed for the year 1918 by the assessments now in question.

Applying the cases cited to the case at bar leads, we think, to no uncertain result.

It is conclusively established that no use whatever can be made by the property of the plaintiff-in-error of any part of the sanitary trunk sewer eleven and three-quarter miles in length and of about one-half the length of the sanitary outlet sewer. All of

such trunk sewer and the first half of the outlet sewer are up-grade from its property. It is a gravity sewer down-grade from the start in North White Plains to the outfall in the Hudson River. The whole of such sanitary trunk sewer is separated from the property of the plaintiff-in-error by a high ridge of land from 200 to 260 feet high.

Furthermore, there is no trunk sewer either constructed or provided for in the Tibbetts Valley excepting only the small part in the Lincoln Park section. Such trunk sewer would have to be about four miles in length and would cost upwards of \$300,000.

The sanitary outlet sewer is essential to the sanitary trunk sewer as it is its only outlet.

The property of the plaintiff-in-error can thus in the event of the construction of the Tibbetts Valley trunk sewer use only a small fraction of the mile and a half of the sanitary outlet sewer (about one-half of its length) in addition to the use made of it for the sewerage of the whole of the Bronx Valley.

To attempt to assess the property of the plaintiff-in-error on the assessments for general taxation for the same amount as the property in the Bronx Valley is assessed notwithstanding the wholly disproportionate benefit is, we submit, unconstitutional and void, as ruled in the cases quoted.

This is not a case of slight variance in benefit. The Act as amended requires the application of a rule grossly disproportionate to the benefits and which must operate unequally and unjustly.

It assesses the property of the plaintiff-in-error for the cost of the whole work exactly the same as property that can be connected directly to the sanitary trunk sewer in the Bronx Valley; although the plaintiff's property (except only some lots in the

Lincoln Park section) cannot make any use whatever of such sanitary outlet sewer by reason of the fact that no trunk sewer in the Tibbetts Valley has been laid or even provided for.

The property of the plaintiff-in-error is thus taken without just compensation and without due process of law both for the benefit of the public at large and for the benefit of other individuals whose proper burden of assessment is thereby lightened.

This result the Fourteenth Amendment of the Federal Constitution forbids.

The character of the improvement in the case at bar, *a trunk sewer for house drainage only*, places a narrow limitation upon the benefits that may be conferred. Improvements of broader scope, such as reclamation and drainage projects, changing for the better the character of large areas of land, result in benefits, we submit, of a wholly different kind. So even is the case with road improvements.

In the *Gast* case *the assessment involved was for the cost of paving the street upon which the plaintiff's property abutted*, so there was no question but that the plaintiff's property in that case had been largely benefited by the improvement. The vice of the assessment which led the Court to declare the ordinance imposing it unconstitutional was that it assessed a grossly unequal proportion of the cost upon the plaintiff's property.

The ordinance in question in the *Gast* case was enacted under the charter provisions of St. Louis which were adopted under the direct authority of the State Constitution which permitted it to enact its own charter. This is stated in the opinion of Mr. Justice Day in *Withnell v. Ruecking Construc-*

tion Co., 249 U. S., 63. Such ordinances had the force and effect of statutes.

The Court said in the *Gast* case at the end of the opinion :

“The charter provisions as applied to a city like St. Louis must be taken to contemplate such ordinances under the construction given to it by the State courts.”

It thus appears that the decision in the *Gast* case rested on the rules applicable to a legislative enactment.

Where it appears, as, here, that the assessment as imposed by the Act of the Legislature is of such a character that the probability is that the parties will be taxed disproportionately to each other and to the benefits conferred, the law is unconstitutional.

The cases relied on by the defendant-in-error all recognize this rule by which the enactment in the *Gast* case was measured and found arbitrary and unjust and therefore unconstitutional.

In *Hancock v. City of Muskogee*, 250 U. S., 454, relied on by the defendant-in-error, the Court, while finding the particular ordinance under consideration constitutional, said, in the opinion of Mr. Justice Pitney, at pages 457-458 :

“We do not mean to say that *if in fact it were made to appear that there was an arbitrary and unwarranted exercise of the legislative power, or some denial of the equal protection of the laws in the method of exercising it, judicial relief would not be accorded to parties aggrieved. The facts of*

this case raise no such question." (Italics ours.)

The defendant-in-error placed much reliance below upon *Miller & Lux v. Sacramento and San Joaquin Drainage District*, 256 U. S., 129.

It was there held that an assessment of 5 cents an acre for general preliminary expenses of the Reclamation Board in a project to reclaim lands in the Sacramento and San Joaquin drainage district in California was constitutional. Such assessment had been *apportioned* against the plaintiff's lands situated in such drainage district by a board of assessors. The case followed the decision in *Houck v. Little River Drainage District*, 239 U. S., 254, which held constitutional an assessment of 25 cents an acre for surveys and preliminary expenses of a drainage and reclamation project.

It thus appears that no new rule has been laid down in the *Miller & Lux* case and that it does not apply to cases similar to the *Gast* case which, we submit, lays down the rule applicable here.

In the case at bar, conceding the validity of assessments such as those involved in the *Houck* and *Miller & Lux* cases, we have assessments which, the allegations of the complaint establish, are arbitrary and unjust.

None of these cases support an equal rate of assessment upon lands directly upon a line of sewer and directly benefited thereby and lands situated remote therefrom with little or no street frontage and in a different valley, which lands can make no present use of any part of such sewer. The only possible future use depends upon the construction of a trunk sewer four miles in length and costing \$300,000 and then only the use of a mile and a half

of a fifteen mile sewer; such use being in addition to the use of that mile and a half as the outlet sewer for the whole of the Bronx Valley.

While in certain cases a drainage project gives rise to indirect benefit to lands adjacent thereto, such benefit must not be treated the same in assessments as the direct benefit to lands fronting directly upon and having the use of such sewer. The nature and degree of benefit are wholly different and such difference must be recognized in a proper apportionment of the assessments between the lands so differently benefited.

Kansas City Southern Ry. Co. v. Road Improvement District No. 6, 256 U. S., 658.

In each of the cases principally relied upon by the defendant-in-error, the Court has carefully pointed out, in holding the particular act or ordinance constitutional, that if an act works an arbitrary injustice to a complaining property owner by imposing upon his property an unjust and unequal assessment wholly disproportioned to the benefits conferred, such act is then unconstitutional.

That is exactly, we maintain, the situation in the present case under the Bronx Valley Sewer Act as amended, and for the reasons in all these cases pointed out such act is unconstitutional.

In *Clark v. Village of Dunkirk*, 12 Hun, 181 (aff'd 75 N. Y., 612), a case holding a sewer assessment invalid in a suit in equity to vacate the assessment, Talcott, J., says, in the opinion of the General Term, at page 188:

"To show that the assessors in this case have proceeded upon erroneous principles in the details of their assessment, it will only be necessary to refer to two or three of the findings of the referee. He finds that some of the property assessed is not benefited at all by the sewer; that some of the land assessed is lower than the bottom of the sewer and cannot be drained into the sewer * * * without a considerable expense and changing the surface of the lots. It also appears that certain of the persons assessed cannot reach the sewer in question for purposes of drainage, without crossing lands belonging to others, and that certain lands were assessed at one uniform rate per foot, without regard to the distance they were situated from the sewer or to the expense of making a connection therewith."

In *People ex rel. O'Reilly v. Common Council*, 53 (N. Y.) App. Div., 58, it was held that the power to defray the expense of the construction of sewers by special assessment "against the property immediately benefited thereby" conferred on the Common Council of the City of Kingston by Section 147 of the Charter (Laws 1896, Chap. 747) does not authorize the Common Council to levy an assessment for the construction of a sewer in a street, upon property abutting on a parallel street, which has no sewer, where the owner of the latter property can utilize the sewer only by constructing another sewer 351 feet long, which would pass through private property for 182 feet.

See also:

Matter of City of New York (Pugsley Arc.), 218 N. Y., 234.

People ex rel. Keim v. Desmond, 186 N. Y., 232.

Providence Retreat v. City of Buffalo, 29 (N. Y.) App. Div., 160.

In *Park Avenue Sewers. Appeal of Clara M. Parker*, 169 Pa., 433, it was held that the cost of constructing a sewer can be assessed only upon the property abutting upon the line of the improvement and that a property owner cannot be assessed with the cost of a 15-inch main sewer when it appears that a 10-inch local sewer would have been sufficient to give the property all the benefit it derives from the main sewer.

Mitchell, J., says, at pages 438-439:

"But beyond this, as already discussed, the limit of special benefit is the limit of the liability to special assessment. The agreed facts show that there is no special benefit to appellant's property from having in front of it a main sewer required only for lands further off from the point of discharge. The flagrant transgression of the fundamental principle by such an assessment may be shown by an illustration which, as I am not familiar with the localities, I take from the appellee's first paper book. Park Avenue sewer drains into a twenty-four inch main sewer in Campbell Street and this in turn into a still larger sewer in Jefferson Street. Whether this leads directly or through still another sewer into the river does not appear, but on the principle adopted by the viewers in the present case, a lot on the river front at the point of final discharge, would have to pay for the largest sewer though it had a natural drainage into the river, and of all the lots in the city it had least need, and got

least benefit from the sewer, *whose size was determined wholly by the requirements and for the benefit of remote properties. Such an assessment cannot be sustained. Appellant's property can only be charged with such proportion of the cost as would have paid for a branch sewer sufficient to give it all the benefits now enjoyed.*" (Italics ours.)

In *Kellogg v. Elizabeth*, 40 N. J. L., 274, it was held that land which can be drained into a trunk sewer only after connecting laterals are built, cannot be assessed for the cost of the trunk until such laterals are constructed.

See also:

In re West Marginal Way, 192 Pac., 961 (Wash.), holding mere speculative benefits are not in reality benefits.

Morris v. Bayonne, 53 N. J. L., 299.

Witman v. Reading City, 169 Pa., 375.

In *Barton v. Kansas City*, 110 Mo. App., 31, it was held that a so-called sewer constructed for sanitary purposes and for which the council provides no connections, so as to afford a means of draining sewage from the land which it sought to assess, is not a sewer within the meaning of the rule allowing local assessments for sewers.

POINT III.

Assessments under such act as amended are wholly disproportioned to benefits in that they are based solely upon the assessments for general taxation, which results in the arbitrary adoption of the value of the lots as they may happen to be laid out upon the tax maps without regard to frontage upon any street or depth of the property, or the distance of large tracts assessed as one lot from the sewer.

Complaint, Seventeenth, p. 15.

In the case of *Gast Realty & Investment Company v. Schneider Granite Company*, 240 U. S., 55 (*supra*, pp. 42-44), the assessment held void on constitutional grounds was an *area* assessment for the paving of the street on which the property fronted. It was held that where the line after running not 100 feet back from the street, jumped to nearly 500 feet, when it encountered an undivided tract, and that on the opposite side of the street was 150 feet and 240 feet away, the Fourteenth Amendment was violated.

In the case at bar by taking *value* as the basis of assessments, in an area of assessment covering many square miles, the outer boundaries of which are described by metes and bounds in the statute, the relation of the lots to the line of the sewer is wholly disregarded. The accident of a single lot number on a large undivided tract results in taking the value of such undivided tract as the basis of assessment without regard to what frontage it has upon any street or the distance from the line of the sewer, or whether it has a narrow frontage

upon a street and extends a long distance away from it. In fact, this scheme of assessment is without regard to whether the property has any street frontage at all.

Notable instances of assessments of large undivided tracts under one lot number are to be found in the assessments in question against the property of the plaintiff-in-error, set forth in the complaint (pp. 3-10).

While most of the assessments are against lots having an assessed value of between \$200 and \$600, there are a number of assessments against single lot numbers covering large undivided tracts of great value; such as six lots ranging in value from \$32,500 to \$87,000 at pages 3-4; one lot \$72,900 at page 4; one lot \$53,400 at page 5; one lot \$132,000 at page 7; three lots \$47,500 to \$160,750 at page 8 and one lot \$300,000 at page 10, the last named being the Dunwoodie Golf Links and club house.

Such a disregard of the benefits to the respective lots and their relation to the improvement renders the statute unconstitutional, we submit, under the rules laid down in the *Gast* case, and the numerous other cases cited in Point II, *supra*.

In *Howell v. Tacoma*, 3 Wash., 711, it was held that an assessment for a street improvement based upon the values of the various parcels of land fronting upon the street, regardless of the frontage and depth of the parcels, which necessarily affect the valuation thereof, and burdening some parcels of land with a charge three or four times as much for each foot of frontage as other parcels situated on said street, is void on the ground of inequality.

POINT IV.

Assessments under such act as amended are wholly disproportioned to benefits in that the assessments upon improved property are based on the assessed value of lands and buildings, while those on vacant property are based on the assessed value of the land.

Complaint, Nineteenth, p. 16.

The Act as amended by Chapter 646 of the Laws of 1917, Section 2, requires that all of the assessments for this sewer shall be upon the amounts assessed against the property for purposes of local taxation which, of course, includes the assessment of all improved properties at their value with the improvements thereon (*supra*, p. 25, and Appendix, *infra*, pp. 83-85).

Such a rule makes certain that the assessments *for sewer purposes only* will be wholly disproportioned to the benefits. Lots having a narrow frontage on a street where such land is improved by an expensive building will thus pay perhaps as much as ten times the assessment on the adjoining vacant property which may have ten times the number of lots fronting on the same street. Furthermore, lots of exactly the same dimensions adjoining on the same street and each having a residence built thereon are assessed at entirely different amounts for such sewer assessment because, although the use made for sewer purposes is the same, one house may have cost five times as much as the other. Such illustrations, which can be multiplied indefinitely, demonstrate that this rule, adopting the assessments of the property for local taxation, is *certain*

to operate unequally and unjustly upon the respective owners of the properties within the Bronx Valley sewer district. Improved property is in fact included in the assessments in question.

As these sewer assessments cover a period of seventy-five years, the unequal operation is also found in assessments against the *same property* for different years according to the increase or decrease in the assessed value of the lands alone and the increase or decrease in the assessed value of the buildings.

In *City of Boston v. Shaw*, 1 Met. (Mass.), 130, it was held that a sewer assessment which was based on the value of land and buildings if the lot were improved is void for inequality.

Putnam, *J.*, says, at page 138:

"Suppose A owns a lot next to the outlet at Charles Street, of the value of \$1,000, which, with the house upon it, is valued at \$10,000, and that B has a lot of the same dimensions, 600 feet from Charles Street, valued at \$1,000. By the ordinance, the contribution should be made according to the valuation of these estates in the books of the assessors. The owner of one lot would be held to pay ten times as much as the other. The apportionment should be made upon the value of the land *independently of the buildings*, and should be settled in the time of the transaction, so that the City would neither gain nor lose by the work, and the rights and liabilities of the owners of the land be definitely ascertained." (Italics ours.)

See also:

Howell v. Tacoma, 3 Wash., 711 (*supra*, Point III).

Sewer taxes assessed upon the value of lots *without the improvements upon them* have been held valid

Snow v. Fitchburg, 136 Mass., 183.

Gilmore v. Hentig, 33 Kan., 156.

Douglass v. Craig, 4 Kan. App., 99.

Dillon on Municipal Corporations (5th Ed.), Sec. 1463 and notes thereto.

The rules laid down in the cases cited under Points II and III, *supra*, are also applicable.

POINT V.

The act as amended requires the supervisors of the County of Westchester to adopt a budget for the Bronx Valley sanitary sewer district and to determine the aggregate amount to be collected by the assessments for each year; such amount to include unconstitutional and unlawful items such as a contingent fund to meet deficiencies of revenue and the cost of all litigation now or hereafter incurred.

Complaint, Twentieth, p. 16.

Amendment, Chap. 646, Laws of 1917,
Sec. 6 (Appendix, *infra*, pp. 87, 88).

Among the items to be included in this yearly budget are:

“(a) *To pay all expense of maintaining and operating the sewer and of keeping the same in repair.*

(b) *To pay all judgments and expenses against the Bronx Valley sanitary sewer dis-*

trict or against the County of Westchester in any way arising out of the construction, operation or maintenance of the sewer.

(c) To pay the cost of all litigation now or hereafter incurred.

*(d) To pay the interest on all bonds or certificates * * * and all other indebtedness properly chargeable to such district under the provision of any present or future laws.*

* * * * *

(f) To provide a contingent fund to meet deficiencies in revenues.

*(g) * * * and for any and all other expenses incurred by reason of or on account of said sewer and said sewer district" (Appendix, infra, pp. 87, 88).*

The items to be included in these special assessments for seventy-five years against the property of the plaintiff-in-error and the other property located within the Bronx Valley sewer district, it thus appears from the statute, cover a very wide range of expenditures.

Negligence judgments for neglect of the officials in charge of the work or their agents and servants are thus included. Also any judgment that in any way arises out of the construction, operation and maintenance of the sewers, no matter whether or not arising from neglect to properly repair or properly perform the work.

The cost of all litigation now or hereafter incurred is also included, which means the assessment upon the property of the plaintiff-in-error for the expenses of this action to test the constitutionality of the Act. This also includes the cost of

litigation where negligence or wrongdoing may be charged and irrespective of whether the defense of such litigation is successful or not.

Indebtedness under any *future* law is also to be charged against these property owners.

They are also to be assessed to provide a contingent fund to meet deficiencies in revenues. This means that if the plaintiff-in-error is assessed its full share and deficiencies of revenues arise from the failure of others to pay their assessments, that the plaintiff-in-error may thereupon be assessed the share of the others who fail to pay. Such an assessment, we submit, violates the fundamental principles of special assessments which must be on the basis of equality in proportion to the benefits conferred.

Finally, as if the items enumerated were not enough, these property owners are to be assessed for any and all other expenses incurred by reason of or on account of said sewer or said sewer district.

We submit that many of these items included in this budget are not the proper subject of sewer assessments against these property owners.

In *Sears v. Street Commissioners*, 173 Mass., 350, it is held that because Statute 1897, Chapter 426, entitled, "An act relative to the sewerage works of the City of Boston," purports to give the street commissioners power to levy special assessments on real estate upon other grounds than the receipt of special benefits, and to amounts beyond the amount, if any, of special benefits, and for expenditures which, as against such property, are not proper subjects for special taxation, it is unconstitutional. It seems that Statute 1897, Chapter 426, entitled, "An act relative to the sewerage works of

the City of Boston," is unconstitutional in that it gives owners of property no opportunity of being heard upon their liability to assessment.

Knowlton, *J.*, says, at pages 352-353:

"The benefits to be considered in taxing each estate are not in terms, those that are special and peculiar, but so far as the language goes, may be those that it receives in common with the other estates in the city and with the inhabitants generally. The fact that the charges to be determined are for the construction, maintenance, and operation of the sewerage works of the whole city, gives some force to the possibility of a construction which includes all benefits; but whether this construction should be adopted or not, the charges may be determined on any grounds which the street commissioners deem just and proper, and may not be founded in any degree, if at all, upon special and peculiar benefits, and may in any particular case largely exceed such benefits. This fact in itself is enough to bring the statute within the prohibition of the Constitution, inasmuch as it purports to authorize a taking of property to pay a charge which is not founded on a special benefit or equivalent received by the estate or its owner. Such a taking would be without due process of law. *Norwood v. Baker*, 172 U. S., 269; *New Brunswick Rubber Co. v. Street Commissioners*, 9 Vroom, 190; *Barnes v. Dyer*, 56 Vt., 469; *Thomas v. Gain*, 35 Mich., 155.

The general tenor of this section seems at variance with the law in regard to special taxation. It seems designed to group together a great variety of expenses, including all that are connected with the administra-

tion of the sewer department in the City of Boston, many of which are proper subjects for general taxation only, and to assess them all upon real estate."

It should be noted in this case just quoted that the general assessment for sewers was upon the value of the land *exclusive of the buildings* (see p. 354).

In *DeWitt v. Rutherford*, 57 N. J. L., 619, it was held that the expenses incurred in unsuccessfully defending suits brought against a borough because of its illegal and negligent acts in executing a public improvement cannot be specially assessed as a part of the cost of such improvement.

In *West Third Street Sewer Appeal of the City of Williamsport*, 187 Pa., 565, it was held that where a sewer has been constructed by a municipality at its own cost an abutting owner is relieved from taxation for the expense of its reconstruction.

See also:

City of Erie v. Russell, 148 Pa., 384.

Hammett v. Philadelphia, 65 Pa., 146.

The plaintiff-in-error pays general taxes each year to the City of Yonkers upon all of its property. These taxes invariably include the expenses of the Sewer Department for the operation, inspection, maintenance and repair of all the sewers in that city. This is the universal rule as to general taxation in all the cities and towns. Notwithstanding such burdens already placed on the property of the plaintiff-in-error as to sewers remotely removed therefrom, this Act as amended

seeks to charge all costs of maintenance and repair of the Bronx Valley sanitary trunk sewer and this sanitary outlet sewer for seventy-five years by special assessments against the property of the plaintiff-in-error. This is so unjust as to amount to the taking of its property without due process of law and without just compensation.

POINT VI.

The act of 1905 as amended up to the year 1917 provided for the fixing of the area for assessments by the commissioners appointed under such act and such area was fixed with opportunity to the property owners to be heard after notice to them. The work was entirely completed in 1913. Notwithstanding the fixing of the rights and liabilities of all property owners, the Legislature in 1917 swept away these rights and attempted to substitute a different assessment area described by metes and bounds. In so providing the constitutional rights of the property owners were disregarded.

Complaint, Eighteenth, p. 16.

A summary of the original Act and all the amendments thereto setting forth the substance of all the material provisions of these laws is to be found, *supra*, at pages 20-23 of this brief. The statutes are printed in the Appendix, *infra*, pages 74-80. See especially pages 76-79.

Such summary is without comment upon these provisions as the character of the legislation clearly appears. It is a complicated patchwork of inconsistent provisions.

A law much simpler and clearer in its provisions was characterized as "*a farrago of irrational irregularities*" by Mr. Justice Holmes in *Gast Realty & Investment Company v. Schneider Granite Company*, 240 U. S., 55, quoted, *supra*, Point II of this brief.

We will not attempt a review and comparison of the many inconsistencies and irregularities disclosed by such summary. The discussion will be confined to a fundamental question which arises upon the amendments to the original Act.

The original Act provided that the Commissioners should make a map of the property benefited and after due notice to the property owners affected and a hearing should correct and file such map. The assessments were all to be based on this map. But no contracts should be let nor work begun until such final map or plan shall have been approved by the State Engineer and the State Department of Health. This was in 1905, Chapter 646, Section 2 (see Appendix, *infra*, pp. 76-78). The work was entirely completed in 1913.

In 1912 when the work under such map and plan was almost entirely completed the Legislature by Act of 1912, Chapter 550, wiped out such map and plan notwithstanding that the rights of the property holders had become fixed thereunder and substituted an entirely different map to be filed by the Commissioners under an amendment, adding such provision to Section 3 of the Act. This amendment provides for a notice and hearing of property owners, and for corrections of the map and filing thereof. Such map is to supersede the map filed under Section 2 of the original Act (see Appendix, *infra*, pp. 78, 79).

Then in 1917, four years after the completion of the work, the Legislature wiped out both of these maps and all proceedings and hearings thereunder and substituted an area of assessment described by metes and bounds without any provision for any notice to or hearing of the property owners as to the apportionment of such assessments in accordance with benefits (Laws 1917, Chapter 646; see Appendix, *infra*, pp. 81-83).

Again this description of the assessment area was amended by Laws of 1918, Chapter 535 (see Appendix, *infra*, p. 83).

This amendment which wiped out the two maps, previously provided for, raises some novel questions. We do not find a case where the Legislature has attempted to do what has been done in this case.

The injustice of such a course is plain. When the rights and obligations of the property owners become fixed under the original map the values of the property with the prospective assessments thereon become fixed. Then in 1912 by the adoption of a different map these values were upset. Again in 1917 by the adoption of the Legislature's area the rights and obligations of the property owners were again disturbed and the values of their properties again affected.

There must be, we submit, a limit to such legislative trifling with property rights.

The absence of notice and hearing in the *apportionment* of such assessments to benefits renders such Act unconstitutional as is established by the cases cited under Point I, *supra*.

We submit that the Legislature cannot, when rights of property owners are fixed and deter-

mined, wipe out such rights and obligations and twelve years later and four years after the completion of the improvement entirely change such rights and obligations.

Cases permitting a reassessment on lawful principles in place of an assessment found unlawful are no support to these amendments because such reassessment is *the first lawful* assessment upon the property.

It is no answer to cite cases holding that an assessment may be laid after the completion of the improvement, for there again it is the first assessment upon the property.

If the Legislature may lawfully establish and then unsettle the rights and obligations of property owners the present process which has extended over twelve years and through three different areas of assessment may be carried on indefinitely.

This, we submit, is vicious in principle and wholly contrary to principles of fairness and justice.

POINT VII.

The case of *Horton v. Andrus*, 191 N. Y., 231, in which certain constitutional questions were raised in reference to the original act, Chapter 646 of the Laws of 1905, did not determine the issues raised in this case which relate to the provisions of the amendments to the act.

Horton v. Andrus was a taxpayer's action to restrain the Commissioners for the construction of the sanitary sewer for the Bronx River Valley from prosecuting the work. The case came up on

certification to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court affirming an order denying a temporary injunction. There were nine questions certified, which are set forth at pages 232 and 233.

The opinion discusses only the question of the County of Westchester incurring debt for what was claimed to be other than a county purpose and the question raised that a hearing should be given before the board of supervisors equalized the assessments. The Court held that there was no force in either contention.

Cullen, C. J., says, at page 237:

"Usually roads, parks and sewers are the work of a municipality, but there are such things as county roads, and we do not see why there may not be county parks and county sewers for the general benefit of the inhabitants of the county. *The prosecution of such an improvement would be a county purpose.* Moreover, the question is, to a certain extent, one of degree. An improvement which was solely for the benefit of a single municipality should not be imposed on the county. *Such, however, is not this case, but the area sought to be drained is so great that failure to properly drain it may be well thought to threaten the health of by far the greater part of the inhabitants of the county.*" (Italics ours.)

This case was decided at the commencement of the undertaking before the amendments made the radical changes in the Act. An examination of the questions certified shows that the issues here were not involved (pp. 232, 233).

No question of assessments against particular property was involved in the *Horton* case, which was a taxpayer's action. The first assessments under the Act as amended were levied in 1918, and are those involved in this action.

It is difficult to see how the rights of a property owner to complain against unconstitutional assessments could have been determined in a *taxpayer's* action brought twelve years before any such assessments were levied.

The questions raised and determined in *Horton v. Andrus* could not be involved in the case at bar, for at the time of that litigation, which arose soon after the passage of the original Act of 1905, and related solely to the original Act, there was no area of assessment fixed. The original Act provided for the fixing of an area of assessment by a commission after full notice to and hearing of all property owners. The lands of the plaintiff-in-error were not then affected by the Act as no area of assessment had been fixed.

The questions now involved in the case at bar arise under the Amendment of 1917 fixing an area of assessment which includes the lands of the plaintiff-in-error and imposing upon such lands an arbitrary and unjust assessment. This amendment wipes out the provisions for notice and hearing and deprives the plaintiff-in-error of any opportunity to be heard upon the apportionment of the assessment against its lands, which is the vital question here presented.

POINT VIII.

The relief prayed for is properly granted in this form of action.

Turner v. Wade, 254 U. S., 64.

Wallace v. Hines, 253 U. S., 66.

Greene v. Louisville & I. R. Co., 244 U. S., 499.

Central of Georgia Ry. Co. v. Wright, 207 U. S., 127.

In *Elmhurst Fire Co. v. City of New York*, 213 N. Y., 87, Collin, J., says, at page 91:

"The taxes, being invalid, were a cloud upon the title of the plaintiff, provable only by evidence *dehors* the record and this action in equity is maintainable."

Citing:

Strusburgh v. Mayor, etc., of N. Y., 87 N. Y., 452.

Alvord v. City of Syracuse, 163 N. Y., 158.

County of Monroe v. City of Rochester, 154 N. Y., 570.

National Bank of Chemung v. City of Elmira, 53 N. Y., 49.

The defendant-in-error contends that this action in equity will not lie, because if the statute in question is unconstitutional such appears on the face of the statute and therefore there is no cloud upon the title to the property of the plaintiff-in-error.

Here, however, the unconstitutionality of this statute does not appear upon the face of the tax

record or the statute. It is only by the establishment of the facts in this suit showing that the application of this assessment to the property of the plaintiff-in-error is so arbitrary and unjust and disproportioned to any benefits that it amounts to the taking of its property without just compensation and without due process of law that the unconstitutionality of the assessments is established. In such a case as this, we submit, it is well settled that the present suit in equity will lie.

Complaint, Twenty-second, p. 17.

POINT IX.

The writ of error should be sustained and the final judgment of the Supreme Court of the State of New York, entered on the remittitur of the Court of Appeals affirming the judgment of the Appellate Division of the Supreme Court in favor of the defendant-in-error, County of Westchester, sustaining the demurrer of the County of Westchester to the complaint and dismissing the complaint, should be reversed, with costs, and the judgment of the Special Term of the Supreme Court overruling such demurrer should be affirmed.

Dated, New York, October 14, 1922.

Respectfully submitted,

ROBERT C. BEATTY,
Counsel for Plaintiff-in-Error.

APPENDIX.

The Statutes.

LAWS OF NEW YORK, 1905, CHAPTER 646
(as amended to 1917)

and

LAWS OF NEW YORK, 1917, CHAPTER 646
(as amended in 1918).

The statute directly in question, under which the assessments involved in this action were levied, is Laws of 1917, Chapter 646, which supplements the original Act, Laws of 1905, Chapter 646, as amended up to that time. The material provisions of such supplemental Act are all printed in the Appendix, *infra*, pages 81-91. Such provisions of the original Act, as amended up to 1917, as are material are here printed.

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LAWS OF NEW YORK, 1905, CHAPTER 646
As Amended to 1917.

AN ACT to provide for the construction and maintenance of a sanitary trunk sewer and sanitary outlet sewer in the county of Westchester, and to provide means for the payment therefor.

Accepted by the city.

Became a law May 26, 1905, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. John E. Andrus, of the city of Yonkers; William Archer, of the city of Mount Vernon, and John J. Brown, of the village of White Plains, all in the county of Westchester, *shall be the commissioners under this act* and are hereafter named and described in this act as the sewer commissioners *and are hereby authorized, empowered and directed to carry out the provisions of this act in the manner hereinafter provided for the purposes of providing a sanitary trunk sewer in the Bronx river valley within the county of Westches-*

*ter, and an outlet sanitary sewer through the city of Yonkers to the Hudson river, and preventing the pollution of the streams in the Bronx valley in the county of Westchester, and preserving the health of the people of Westchester county. * * **

And the said commissioners, in order to carry out economically the provisions of this act for the best interests of taxpayers and the people of the county, are hereby authorized, empowered and directed to consider the construction, operation and maintenance of the said sanitary sewer and outlet sewer, their principal function and duty and all other powers granted to them by this act to be subordinate and incidental thereto; excepting in so far as the exercise of said powers in their judgment may be necessary or essential to preserve the health of the people of Westchester county, during the period of the construction of the said sanitary sewer and outlet sewer. And the said commissioners shall so carry out the powers and provisions of this act that the total amount of all expenditures made or liabilities incurred by them for the construction, operation and maintenance of said sewer and outlet sewer and for obtaining lands and easements therefor, shall not exceed three million, eight hundred sixty-six thousand, one hundred seventy dollars, and they are prohibited from contracting for any greater expenditure. * * *

(Note: The original act placed the limit of expenditures at two million dollars. This was increased by successive amendments to three million, eight hundred sixty-six thousand, one hundred seventy dollars, the last amendment being Laws of 1914, Chapter 487.)

Section 2. *It shall be the duty of said commissioners to adopt the survey already made, by the commission formed for that purpose, of such lands within the sewerage area of the said proposed sewers, and to make or cause to be made such amendment or amendments thereto as said commissioners may deem necessary, or as may be required by the provisions of this act, and for the purposes of this act such commissioners may retain all necessary counsel and attorneys and are empowered to employ and at pleasure discharge competent civil engineers and surveyors, and to enter upon any and all the lands deemed necessary by the said commissioners for the purposes heretofore and hereafter set out, and survey the same, and take levels thereof, and by themselves, their servants and agents, do all things necessary to the preparation, for the construction and completion of a sanitary trunk sewer from the northerly line of the town of White Plains, at or near the Bronx river, in the county of Westchester, thence southerly along the Bronx river, in or through the towns of White Plains, Greenburgh, Scarsdale, East Chester and the cities of Mount Vernon and Yonkers, to or near the southerly line of the city of Yonkers; and of an outlet sanitary sewer from thence westerly through the city of Yonkers into the Hudson river. * * * The map, which shows or shall show the entire area benefited by the sanitary sewer and outlet sewer and the plan or plans thereof heretofore made and amendments which may be made thereto as in this act provided shall remain on file in the office of the said commissioners, and be open to public inspection and shall be the plan according to which the said sewers and appurtenances shall be con-*

structed, subject to such changes or modifications as the said commissioners may from time to time deem necessary for the more efficient carrying out of the provisions of this act. A copy of the plan so adopted as aforesaid, with a certificate of such adoption written thereon, signed by said sewer commissioners or a majority of them, shall be deposited and remain on file in the office of the supervisors of the county of Westchester, and shall be filed in the county clerk's office of Westchester county. When said maps shall be entirely completed and amended by the commissioners aforesaid and filed as aforesaid, showing the area to be benefited, the commissioners shall fix a time and place within the county of Westchester, where all property owners shall have an opportunity to be heard, as to the plans submitted and the area benefited. Notice of the time and place of such meetings shall be given by the commissioners by notice published at least one week before the time fixed for the meeting, in a newspaper published in the city of Mount Vernon, and also in a newspaper published in the city of Yonkers and in the village of White Plains. After such hearing should the commissioners determine on any change in the plans or map or area benefited, a new map or plans shall be filed in the places designated above, and thereafter and before the actual construction of such sanitary sewers, said final map and plans shall be subject to the approval of the state engineer and the state board of health, and contracts shall not be let nor shall work be begun under the said final map or plan until such final map or plan shall have been approved by the state engineer and the state department of health. The final map or plan, after approval by the state engineer and state department

*of health as aforesaid, shall be deposited and filed, and remain on file in the office of the supervisors of the county of Westchester, and shall be filed in the county clerk's office of said county. * * * The construction and maintenance of said sewers and the works authorized by this act are hereby declared to be for a public purpose.*

*Section 3. * * * It shall be the duty of the commissioners appointed under the provisions of chapter 361 of the laws of 1911 to prepare a map showing the lands included within the sewerage area of said proposed sewers, which, when completed, shall be signed by and remain on file in the office of said commissioners, and be open to public inspection. Upon filing such map, the commissioners shall fix a time and place within the county of Westchester where all property owners shall have an opportunity to be heard and make objection as to the area benefited as shown on said map. Notice of the time and place of such meeting shall be given by the commissioners by notice published at least one week before the time fixed for the meeting, in a newspaper published in the city of Mount Vernon, and also in a newspaper published in the city of Yonkers, and in the village of White Plains. After such hearing should the commissioners determine on any change as to the area benefited they shall cause the map showing the area benefited to be amended in accordance therewith, and file the same in the office of the supervisors of Westchester county, and a copy thereof certified by them in the office of the county clerk of Westchester county. When completed and filed as above provided, such map shall supersede any map or maps now on file showing the lands within such sewerage area, and*

have the same force and effect as if prepared and filed in accordance with the provisions of section two of this act. (Added to Section 3 by Laws 1912, Chap. 550.)

Section 14. *To pay the cost of construction of the sanitary trunk sewer and the outlet sewer herein provided for, and the cost of construction of a suitable plant for settling, reducing, or screening the sewerage to pass through said outlet sewer, which plant said commissioners are hereby authorized to cause to be constructed, and to pay the cost of operation of same as hereinafter provided, and to pay all the expenses and liabilities lawfully incurred by the said sewer commissioners and their duly appointed successors, including the sums paid or necessary to pay for lands and easements acquired and obtained in accordance with the provisions of this act, the amounts of temporary certificates or loans issued or to be issued, or secured by the county of Westchester to pay the interest on bonds issued under the provisions of this act, prior to the levy of the first assessment hereunder, the county of Westchester is hereby authorized to issue in the name and under the seal of the said county, in behalf of the district laid out on the plan and map approved under section two of this act as modified by this act, its bonds in addition to the amount which it is now authorized to raise, in such sum or sums as shall equal the entire cost of the sewer hereunder, and all temporary certificates issued or to be issued by the county treasurer, not to exceed three million, eight hundred sixty-six thousand, one hundred seventy dollars, not including, but in addition to, such sums as may be or may have been*

received for accrued interest on deposits or premiums on sales of such bonds heretofore made or hereafter to be made. *Such bonds and interest to be payable by their terms by assessment and levy of taxes upon the real property laid out on the plan and map approved as set forth in section two of this act as modified by this act, and not by levy upon the entire property in the county of Westchester.* * * * *One-fiftieth of the entire issue thereof to be payable twenty-five years from the time the first of said bonds are issued; and thereafter one-fiftieth thereof shall be payable in each year until the whole issue of said bonds shall be fully paid.* * * * (Section 14 as amended by Laws 1914, Chap. 487.)

Section 18. * * * and the said board of supervisors are hereby authorized and directed to make such ordinances, rules and regulations as to making connections with said sewers as may be necessary to compel and enable cities, villages and towns to connect with them *and to exclude therefrom all surface drainage except sewage.* * * * (Section 18 as amended by Laws 1915, Chap. 655.)

Section 21. * * * If any section, part, provision, or clause in this act shall for any reason be held invalid, such invalidity shall not affect the validity of any other section, part, provision or clause of this act.

The Statutes Directly Involved.

LAWS OF NEW YORK, 1917, CHAPTER, 646, AS
AMENDED BY LAWS OF 1918, CHAPTER 82,
AND LAWS OF 1918, CHAPTER 535.

LAWS OF NEW YORK, 1917—CHAP. 646.

AN ACT to supplement chapter six hundred and forty-six of the laws of nineteen hundred and five, * * * as amended; to fix and determine the area benefited by the trunk sewer and outlet sewer constructed and maintained under the provisions of said act, as amended, and to provide for taxes and assessments within and without such benefited area to pay the cost of constructing, maintaining and operating the said trunk sewer and outlet sewer.

Whereas, pursuant to the provisions of this act and the amendments thereto to which this act is a supplement a sanitary trunk sewer in the Bronx valley in the county of Westchester and an outlet sanitary sewer to the Hudson river through the city of Yonkers, in said county, have been constructed and are now being maintained and operated, and

Whereas, as provided in said act as amended the commissioners appointed by said act did adopt and cause to be filed a map or plan showing the area to be benefited, and

Whereas, such map or plan includes certain land which in equity should not be included in the benefited area and excludes certain land which in equity should be included therein, and it is therefore deemed necessary to fix and determine the area

benefited by such trunk sewer and outlet sewer, and

Whereas, in the city of Mount Vernon the cost of all sewers heretofore constructed has been paid by said city out of the proceeds of general taxation on all property, real and personal, liable to taxation therein and it is deemed equitable that the proportion of any tax or assessment apportioned to the land in the benefited area and within the city of Mount Vernon should be paid by the city of Mount Vernon in like manner,

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. *The district or area in the county of Westchester, and including therein all or any part of the cities of Yonkers, Mount Vernon and White Plains and the towns of Eastchester, Scarsdale and Greenburgh, hereinafter particularly described, shall be known as "The Bronx valley sanitary sewer district" and all lots or parcels of land within such district or area are declared to be benefited by the construction and maintenance of the trunk sewer and outlet sewer constructed and maintained under the provisions of the act and the amendments thereto to which this act is a supplement and, except as hereinafter provided, shall be subject to the taxes or assessments imposed by this act to pay the cost of the construction of such sewer and of maintaining and operating the same and to pay all indebtedness with interest thereon incurred in the construction, maintenance and operation thereof, or in connection therewith, except that the part of such taxes or assessments apportioned to the*

lots or parcels of land in such district and situate within the city of Mount Vernon shall not be assessed and levied against such lots or parcels of land but the amount so apportioned shall be paid by said city of Mount Vernon and shall be levied and assessed and collected as a general city tax on all taxable property both real and personal liable to taxation in said city of Mount Vernon: and that no lots or parcels of land in such Bronx valley sanitary sewer district shall be exempt from the taxes and assessments imposed by this act except such as may belong to the United States or are used as a cemetery. *The district or area to constitute the "Bronx valley sanitary sewer district" is described as follows:*

(Then follows a description by metes and bounds, covering thirty-one pages.)

(This act was amended by Laws of 1918, Chapter 535, by correcting the description by metes and bounds so as to include about six pages of such description omitted from the act quoted above and correcting the assessments already imposed accordingly.)

§ 2. *The annual assessment-rolls in each city or town in whole or in part within the Bronx valley sanitary sewer district shall be used for the purpose of the Bronx valley sanitary sewer district tax. In addition to all other requirements of law the assessors in each city and town included in whole or in part within the Bronx valley sanitary sewer district as defined in this act shall make the annual assessment-rolls in such form, by proper subdivision of the assessment-roll, or by separate columns therefor, or by both of said methods, or otherwise, as shall*

(a) *Show and identify all lots or parcels of land in such city or town which shall be within the Bronx valley sanitary sewer district as defined in this act. Among the lots or parcels of land so shown and identified as being within the Bronx valley sanitary sewer district shall be included all lots or parcels of land exempt or partially exempt from taxation by the provisions of any general, local or special law with the exception of lots or parcels of land belonging to the United States or used for cemetery purposes and all such exemptions so shown or identified shall be assessed for the tax provided for in this act in the manner provided by law for lots or parcels of land which are not exempt from taxation. If only part of a lot or parcel of land shall be within the limits of such Bronx valley sanitary sewer district such part shall be separately assessed. If a lot or parcel of land lying wholly within the limits of such Bronx valley sanitary sewer district shall be divided by a line between two or more tax districts it shall be assessed as provided in the tax law. If only part of a lot or parcel of land shall be within such Bronx valley sanitary sewer district and such part shall be divided by a line between two or more tax districts the portions of such part lying within each of such tax districts shall be separately assessed therein.*

(b) *Show separately and as a distinct item the aggregate assessed values of all lots or parcels of land or parts of lots or parcels of land in such city or town which are included within such Bronx valley sanitary sewer district and assessed in such city or town as herein provided. In such aggregate assessed value shall be included the assessed values*

of lots or parcels of land otherwise exempt from taxation but which are to be assessed for the tax provided for in this act as herein provided.

(c) Contain a separate column for the extension of such Bronx valley sanitary sewer district tax or assessment against all lots or parcels of land or parts of lots or parcels of land within such Bronx valley sanitary sewer district as are shown upon such assessment-rolls as subject to the tax provided by this act and as herein provided. Provided, however, that in the city of Mount Vernon there shall be a separate column for the extension of such tax against all property both real and personal appearing on the assessment-roll of said city as liable to general taxation and not exempt therefrom.

§ 3. *At the times and in the manner provided by law, the assessment-rolls of each city or town in whole or in part within the Bronx valley sanitary sewer district shall be open to inspection, and the assessors of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided for in this act.*

§ 4. The board of supervisors of Westchester county at its annual meeting shall examine the assessment-rolls of the several cities and towns included in whole or in part within the Bronx valley sanitary sewer district as defined in this act for the purpose of ascertaining whether the valuations in each of such cities or towns bear a just relation to the valuations in all of the other cities or towns within such Bronx valley sanitary sewer district; and the board may increase or diminish the aggregate valuation of the real estate in each of

such cities or towns shown on the respective assessment-rolls of such cities or towns as located within such Bronx valley sanitary sewer district using for that purpose the equalization rule provided in the tax law in so far as the same may be applicable.

§ 5. In addition to all other powers conferred by law on the board of supervisors to correct the assessment-rolls, if it shall be made to appear to the board of supervisors upon the verified petition of the assessors of any city or town in whole or in part within the Bronx valley sanitary district, or to any member of the board of supervisors.

First: That real estate in said city or town not within said Bronx valley sanitary sewer district is shown upon the assessment-rolls to be within said district the board of supervisors may correct the assessment-rolls so as to show that such property is not liable to assessment and taxation for the Bronx valley sanitary sewer district.

Second: That taxable real estate in such city or town and within the Bronx valley sanitary sewer district is not shown on such assessment-rolls to be within such Bronx valley sanitary sewer district the board of supervisors shall cause to be personally served on the person or corporation owning such real estate a copy of such petition with notice of presentation thereof to the board of supervisors at least ten days before the regular or special meeting of the board of supervisors, at which the same will be acted upon, and the board of supervisors shall take no action on such petition unless proof of the personal service of such petition and

notice be made to them by affidavit. The board of supervisors shall give such person or corporation an opportunity to be heard and after such hearing if the board of supervisors shall find that the property so referred to in such petition lies within the Bronx valley sanitary sewer district it shall cause the fact to be indicated upon the assessment-rolls.

§ 6. *It shall be the duty of the board of supervisors of the county of Westchester in each calendar year by a resolution adopted at any regular or special meeting to adopt a budget for the Bronx valley sanitary sewer district, and to determine the aggregate amount of the tax to be collected for such district for such year. In such budget all balances in the hands of the county treasurer shall be credited and provision shall be made sufficient:*

(a) To pay all expense of maintaining and operating the sewer and of keeping the same in repair.

(b) *To pay all judgments and expenses against the Bronx valley sanitary sewer district or against the county of Westchester in any way arising out of the construction, operation or maintenance of the sewer.*

(c) *To pay the cost of all litigation now or hereafter incurred.*

(d) To pay the interest on all bonds or certificates of indebtedness issued under the provisions of chapter six hundred and forty-six of the laws of nineteen hundred and five, as amended, chapter four hundred and twenty-five, laws of nineteen hundred and fifteen, and chapter two hundred and

forty-five, laws of nineteen hundred and sixteen, and all other indebtedness properly chargeable to such district under the provision of any present or future laws.

(e) *To provide for the payment of all bonds falling due.*

(f) *To provide a contingent fund to meet deficiencies in revenues.*

(g) *To provide for the payment of all advances made by the county of Westchester and for any and all other expenses incurred by reason of or on account of said sewer and said sewer district.*

§ 7. *After adopting the budget, and fixing the aggregate tax for such Bronx valley sanitary sewer district, as hereinbefore provided, it shall be the duty of the board of supervisors of the county of Westchester, by a resolution passed at any regular or special meeting thereof, to apportion to, and levy against, the several towns and cities within the Bronx valley sanitary sewer district the amount of said tax according to the equalized value of the real estate in such towns or cities, appearing upon the assessment-rolls as situated within the limits of such Bronx valley sanitary sewer district, and a copy of said resolution certified by the chairman of the board of supervisors and attested by the county seal of said county shall forthwith be delivered to the supervisors of each of such towns and filed with the city clerk of each of such cities on or before the first day of April in the year nineteen hundred and eighteen and on or before the twentieth day of March in each year thereafter (Section 7 as amended by Laws of 1918, Chapter 83).*

§ 8. The amount of the tax of the Bronx valley sanitary sewer district, apportioned to each of such cities, as hereinbefore provided, shall be paid by each of such cities to the county treasurer or shall be deposited in such bank in such city as the county treasurer may direct; one-half on or before the fifteenth day of May and one-half on or before the fifteenth day of November in each year. Upon making payments to the county treasurer all such taxes so apportioned to any such city for such year shall belong to such city and be collected by it for its own account. * * *

§ 11. *Forthwith upon the receipt and filing with the supervisor of each town and the city clerk of each city of the certified copy of the resolution of the board of supervisors apportioning the Bronx valley sanitary sewer district tax, the amount of such tax apportioned to such city or town, as the case may be, shall be apportioned and extended in the separate column to be provided in the assessment-rolls for that purpose against the lots or parcels of land in such city or town which shall appear on the assessment-rolls to be within such Bronx valley sanitary sewer district and liable to the taxes therefor as provided in this act. Immediately after such extension and apportionment shall be completed in each of the cities, the mayor and city clerk, and in each of the towns the supervisor, shall execute and deliver to the officer charged by law with the duty of collecting taxes a warrant for the collection of the Bronx valley sanitary sewer district tax. The lien of the Bronx valley sanitary sewer district tax shall attach to the property taxed on the fifteenth day of April in the year nineteen hundred and eighteen and on the first day of April*

*in each year thereafter, and for thirty days after said tax shall have become a lien said tax may be paid without additional charge, percentage or penalty, but to all taxes paid after such thirty days there shall be added interest at the rate of eight per centum per annum computed from the date when such tax shall have become a lien to the date of the sale of the tax lien. * * ** (Section 11 as amended by Laws of 1918, Chapter 82.)

§ 12. *The Bronx valley sanitary sewer district tax inserted in the tax-rolls of any city or town, as provided in this act, shall be part of the annual tax, if any, upon the respective lots or parcels of land against which it has been extended on the assessment-rolls as aforesaid, and the lien thereof may be sold or foreclosed as the general city taxes in said city or the state and county taxes in said town. The receiver of taxes or other officer charged with the duty of receiving and collecting taxes may, in his discretion, receive the payment of the Bronx valley sanitary sewer district tax upon any lot or parcel of land separately from all other taxes (Section 12 as amended by Laws 1918, Chapter 82).*

§ 13. All acts and parts of acts in conflict herewith are hereby repealed. *If any portion of this act shall be declared unconstitutional, the remainder shall stand, and the portion declared unconstitutional shall be excluded.*

§ 14. *Anticipated payments made by any city or town to the county treasurer, for which the city or town shall not have been reimbursed by taxes which it is entitled to retain, shall be forthwith refunded by the county in case the provisions of this act*

authorizing or requiring anticipated payments by cities and towns are unconstitutional or for any reason unauthorized or in case such payments were unauthorized by reason of any constitutional or other defect in this act or in the proceedings thereunder, except the failure of such city or town or officers thereof to perform some duty lawfully imposed upon them by this act and all payments made by any city or town on account of taxes which cannot be collected or on account of taxes which such city or town shall be obligated to refund, shall be forthwith refunded by the county to such city or town, whenever the inability to collect or the obligation to refund such taxes shall arise by reason of any constitutional or other defect in this act, or in proceedings thereunder, except the failure of such city or town or the officers thereof, to perform some duty lawfully imposed upon them; but in any such event, the county shall be entitled to be reimbursed by the district for the amounts so paid to any city or town to the extent that taxes therefor may be lawfully imposed and collected under this act or any amendment thereof (Section 14 as added by Laws of 1918, Chapter 82).

§ 15. *In any action or special proceeding in a court of record involving the constitutionality of this act, or the status or boundaries of the Bronx valley sanitary sewer district, or the validity or amount of any assessment or tax imposed by this act, the county of Westchester shall be a necessary party (Section 15 as added by Laws of 1918, Chapter 82).*

FILED

JAN 5 1921

SUPREME COURT OF THE UNITED STATES

No. 126

OCTOBER TERM, 1920

THE VALLEY FARMS COMPANY OF YONKERS

Plaintiff-in-Error

against

COUNTY OF WESTCHESTER

Defendant-in-Error

IN ERROR TO THE SUPREME COURT OF THE
STATE OF NEW YORK

Brief for Defendant-in-Error

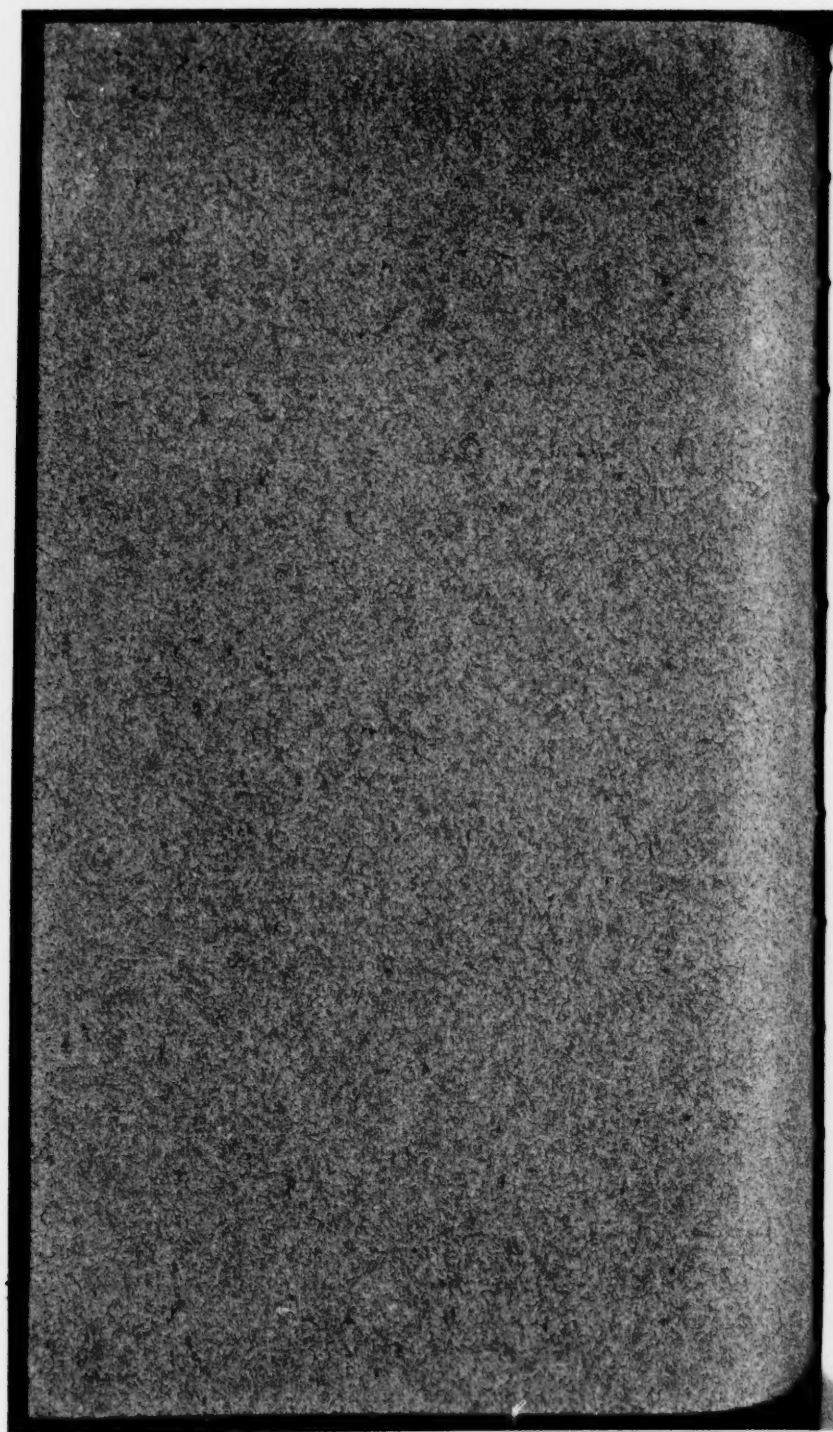
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Supreme Court of the United States

No. 136—OCTOBER TERM, 1922.

THE VALLEY FARMS COMPANY OF
YONKERS,
Plaintiff-in-Error,
against

COUNTY OF WESTCHESTER,
Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEW YORK.

BRIEF FOR DEFENDANT-IN-ERROR.

This case is here on a writ of error to the New York Supreme Court, to review a judgment entered on the remittitur from the Court of Appeals of that State upholding the Bronx Valley Sanitary Sewer Assessment for the year 1918 against the property of the plaintiff-in-error, it contending that the statute of the State of New York known as the Bronx Valley Sanitary Sewer Act, being Chapter 646 of the Laws of 1917, involved in this assessment violates the Fourteenth Amendment of the Constitution of the United States (Record, page 17).

The defendant-in-error while not controverting the facts in this case, does desire to call the atten-

tion of the Court to the fact that the statement of facts made by the plaintiff-in-error includes conclusions of law and arguments which are not warranted by any part of the record.

Burden Assumed by Plaintiff-in-Error.

The plaintiff-in-error confronted with the rule frequently laid down by this Court that the State Legislature

“may create taxing districts to meet the expenses of local improvements, and may fix the basis of taxation without encountering the 14th amendment unless its action is palpably arbitrary or a plain abuse.”

Kansas City Southern Ry Co. v. Road Improvement District, 256 U. S., 658;

Gast Realty Co. v. Snyder Granite Co., 240 U. S., 55;

Houck v. Little River Drainage District, 239 U. S., 254;

and further with the rule that

“in the absence of flagrant abuse or purely arbitrary action.”

(*Miller & Lux v. Sacramento & San Joaquin Drainage District*, 256 U. S., 129),

“if the proposed improvement is one which the State had authority to make and pay for by assessment on property benefited, the legislature, in the exercise of the taxing power, has authority to determine, by the statute imposing the tax, what lands, which might be benefited by the improvement are in fact benefited by it; and if it does so, its determination is conclusive upon the owner, and the courts,

and the owners have no right to be heard on the question whether their lands have been benefited or not."

Branson v. Bush, 251 U. S., 182;
Spencer v. Merchant, 125 U. S., 345;
French v. Barber Asphalt Paving Co., 181 U. S., 324, 342;

and further with the rule that with value as the basis of assessment,

"it is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discussion of the State legislature, and with which this court ought to have nothing to do. The way at arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law."

Fallbrook Irrigation District v. Bradley, 164 U. S., 112, 176, 177;
Bauman v. Ross, 167 U. S., 548, 590;
Hancock v. City of Muskogee, 250 U. S., 454, 459;

and further with the rule that

"it is settled that if provision is made for notice to a hearing of each proprietor, at some stage of the proceeding, upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

Paulsen v. City of Portland, 149 U. S., 30;
St. Louis & Kansas City Land Co. v. Kansas City, 241 U. S., 419, 430;

and finally with the rule that legislative power in establishing the bounds of a sewer district

"was not wanting in due process of law because of the mere fact that there was no previous notice to the property owner or opportunity to be heard."

Hancock v. City of Muskogee, 250 U. S., 454, 457;

has necessarily argued this case upon the assumed premises:

1. That the Legislature of the State of New York in creating and defining as it did by Chapter 646 of the Laws of 1917 the Bronx Valley Sanitary Sewer District so as to include the property of the plaintiff-in-error violated the 14th amendment of the United States Constitution, in that such inclusion of plaintiff's property was a plain abuse of legislative authority, thereby taking plaintiff's property without due process of law.

2. That the Legislature of said State by declaring in said act that all property included within the said district of assessment was benefited by the construction and maintenance of said sewer and was subject to assessment therefor (see Statute, Plaintiff's Brief, p. 82) was entirely arbitrary and wholly unwarranted.

3. That the Legislature of said State, by declaring in said act that value is the proper basis for determining the Bronx Valley Sani-

tary Sewer assessment, thereby eliminating consideration of the location of parcels to the sewer itself, of street frontages, or of whether improved or unimproved, did, therefore, produce gross inequality.

4. That the Legislature of said State by declaring in said act that value is the proper basis for levying the said assessment, thereby prevented the assessors from apportioning the assessment according to benefits. (Plaintiff-in-error does not question the reasonableness of the giving of the notice and hearing provided for it under Sections 36 and 37 of the Tax Law of the State of New York and the requirements of the Charter of the City of Yonkers for the levying of the general city taxes in said city.)

5. That the Legislature of said State had no constitutional right to establish the district as it did without notice to the plaintiff-in-error and an opportunity to be heard.

Argument.

The arguments made and conclusions drawn by the plaintiff-in-error must necessarily depend upon such assumed premises. If these premises are unsound and contrary to the established law judicially declared by this and other courts, then it follows that no relief can be accorded plaintiff-in-error and the writ of error must either be dismissed or the judgment affirmed.

To establish that such assumed premises are unsound and that the act in question is constitutional, it will first be necessary to state a few undisputed

facts requisite for an intelligent discussion of the legal questions involved.

There is no question of fact here involved that is disputed, and counsel for plaintiff-in-error so stated in the courts below. He further stated that it was solely a question of whether or not this act was constitutional.

The Bronx Valley Sewer was constructed under and pursuant to the provisions of Chapter 646 of the Laws of 1905 which although amended several times such amendments are not material here. By Section 14 of said Act, provision was made for the levying and collection of the tax to pay therefor in the following language:

"And for the purpose of raising money to meet said bonds and the interest thereon, and for the maintenance of said sewer after construction, the Supervisors of the County of Westchester shall annually, at the time the general tax levy is made, levy upon the real estate in each municipality within the area described and set forth in the maps and plans filed under Section Two hereunder as modified by this act, the proportion in which the assessed valuation of the real estate within such area bears to the assessed valuation of the entire property shown and laid out on the maps aforesaid. And the local authorities of each municipality shall assess such amount pro rata on the real estate within the area benefited shown on the plans and maps aforesaid, within each municipality as modified by this act, based on the assessed valuation of real property within such area; and said local assessment shall be subject to a hearing and grievance day, as other assessments in such municipality, and the said taxes so levied shall be collected in the same manner as other

taxes are levied and collected in said towns and cities and villages, and such levy, assessment or proportionate part shall be a like lien as general taxes until the amount thereof is paid to the treasurer of the County of Westchester, and the County of Westchester is hereby authorized and directed, in case of the refusal or neglect to pay into said treasury within the time required by law, an amount sufficient to meet such levy, assessment or proportionate part of the interest and principal of such bonds, and the cost of maintenance, to issue a certificate of indebtedness as in this act provided. The board of supervisors, at their annual meetings, after the commission created hereunder shall cease to exist, shall examine the assessment roll of the several towns and cities lying within said sewerage area for the purpose of ascertaining whether the valuations of the real estate lying within the area in one town or city bears a just relation to the valuation of the real estate lying within the sewerage area in all the towns and cities in said county within said sewerage district, and they may increase or diminish the aggregate valuations of real estate in such sewerage area in each town or city by adding or deducting such sum upon the hundred as may, in their opinion, be necessary to produce a just relation between all the valuations of such real estate within said sewerage area, but they shall in no instance reduce the aggregate valuation of all the lands in said sewerage area below the aggregate valuations thereof made by the local assessors."

It is submitted that Chapter 646 of the Laws of 1917 does not change the original plan as outlined by the Legislature, but simply makes it more explicit. Provision for the apportionment of the

assessment on valuation is in the original act. If these provisions of the original act were constitutional, certainly the same provisions made more explicit by the supplemental act are constitutional.

Said section also provided that all land which could use the sewer whether the same be called "trunk sewer" or "outlet sewer" should be included, using the following language:

"Any lands of each town and city in the Bronx River Valley outside the natural sewerage area of the Bronx River shown on the map filed by the Commissioners as required by this Act, which may become connected with the sanitary trunk sewer in said valley, or with said outlet sewer from the Bronx Valley to the Hudson River, or have the use thereof for sewerage, shall be included in the sewerage area of such towns or city as lands benefited by said sewerage system and be subject to levy and assessment as provided in this Act."

Chapter 646 of the Laws of 1917 is but an amplification of these provisions and provides a definite district and detailed method and manner of procedure for the levying and collecting of the taxes.

Under this last act the taxes in question were levied and this action is brought to have them cancelled as a cloud on title, upon the ground that such act is unconstitutional.

The sewer is about fifteen miles long and one part of it is referred to in the original act as "Sanitary trunk sewer" and the other part as "Sanitary outlet sewer" (Plaintiff's Brief, pp. 74 and 75), the latter being the continuation of the former, and Section 14 of Chapter 646 of the Laws of 1905, quoted above, specifically provided that all of the property that could use any part of the sewer by whatever name called should help pay for it.

The reference by plaintiff-in-error to the seven sections of the sewer has no bearing on this case, as it was so divided by the Sewer Commission in preparing for and letting the contract for the construction thereof and such division was for no other or different purpose.

There is no question but that all of the property included within the district itself, can or will in time when the necessary sub-trunk and lateral sewers have all been constructed drain into this sewer. There can be no question but that all of the property so included "may become connected with the sanitary trunk sewer * * * or said outlet sewer" (Section 14, quoted above).

The property of the plaintiff-in-error against which it is seeking to cancel this tax is in the Tibbetts Valley, City of Yonkers (Plaintiff's Brief, p. 5). A part of its property is in what is known as Lincoln Park in said valley and the property in said Park can and does use the sewer (Plaintiff's Brief, pp. 42 and 46).

A large part of the property in the sewer district is not at present connected with the sewer and can do so only after building sub-trunk or lateral sewers and these sections or communities or villages that are now using the sewer have heretofore constructed and paid for such necessary sub-trunk or lateral sewers the same as the plaintiff will have to do. None of the owners of property in the district connect directly with the sewer. It uses the sewer only through sub-trunk or lateral sewers.

The act provides that the value of the property in the district is the method of assessment and the basis of a tax. It happens that such value is

the same and so long as value is the method must be the same as that used for general taxation. It also happens that the same notice and hearing is given for the sewer assessment as is given for general taxation. There is no question but that the notice and hearing for general taxation is sufficient and plaintiff-in-error does not question it (Sections 36 and 37, New York State Tax Law).

The sole ground under which the Supreme Court of the State of New York, sitting at Special Term (Record, p. 19), overruled the demurrer as interposed by the defendant-in-error to the complaint herein was that if the allegations of fact contained in Paragraphs 13, 14, 15, 16 and 19 of said complaint are true, there may be serious doubt as to the legality of the assessments against the plaintiff's property.

**Paragraphs 13, 14, 15, 16 and 19 of the
Complaint.**

Paragraph 13 says that the property of the plaintiff cannot connect with that part of the Bronx Sewer known as the trunk part. This is clearly answered by the 14th paragraph where it is stated that the plaintiff's property can connect with that part of the sewer known as the outlet part; and further, that a portion of the Tibbetts Valley (Lincoln Park), in which valley the most of the plaintiff's property is and in which park a portion of its property is, can or does at present connect with such outlet part.

Paragraph 14 says that the plaintiff's property does not have the benefit of the use of the sewer for its entire length. This is true in reference to all property within the district, or any sewer district.

Paragraph 15 of the complaint says in effect that in order for plaintiff's property to drain into the sewer there will have to be built a trunk sewer in Tibbetts Valley. This is also true of the entire district because no property in the district can or does use the sewer, except through a sub-trunk or lateral sewer. The plaintiff-in-error evidently fails to appreciate that this is a general trunk sewer for a large area and not a street sewer to which house connections are made.

Paragraph 16 contains no possible question of fact, but is simply a criticism of the law, which requires the property owner near the outlet of the sewer to pay at the same rate as the property owner near the source of the sewer.

Paragraph 19 raises no question of fact. It states very frankly one of the questions of law involved in this case, namely: "Can the apportionment of the sewer assessment be made a valuation?"

The affirmative of that question is well settled, not only by the decisions of this Court, but also by the decisions of the courts of the State of New York.

The Appellate Division of the Supreme Court saw no such doubt in the facts as did the Special Term, and in a very able opinion (Record, pp. 25-28) negatives every contention of the plaintiff-in-error and holds that the assessments in question are valid, and that the statutes involved in the same are constitutional. This decision of the Appellate Division was affirmed by the Court of Appeals, without opinion (231 N. Y., 558).

The Bronx Valley Sanitary Sewer assessment as levied against the property of plaintiff-in-error cannot be compared with:

(a) An assessment levied under a charter provision providing that same be assessed according to frontage and area, giving certain instructions for ascertaining the area, which area as finally determined in the case of certain parcels was of unequal depth, so that the parties were taxed disproportionately to each other and to the benefits conferred (*Gast Realty and Investment Co. v. Schneider Granite Co.*, 240 U. S., 55).

(b) An assessment levied by a duly appointed board, where a statute prescribed no definite standard for determining benefit, the assessors having assessed farm lands and town lots, according to area and position and wholly without regard to their value, improvements thereon, or their present or prospective use and disregarding both area and position, undertook to estimate benefits to railroad property without disclosing any basis therefor, but apparently according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would increase its value, considered as a component part of the system (*Kansas City So. Ry. Co. v. Road Improvement District No. 6*, 256 U. S., 658).

(c) An assessment levied against an island of the highest uniform elevation above sea level in Southwest Louisiana, which could receive no benefit direct or indirect by the draining of the other land, and which needed no drainage itself, having been included in the drainage area as fixed by the local legislative body (*Wyles Salt Co., Ltd. v. Board of Commissioners*, 279 U. S., 476).

In the case at bar the tax or assessment on the

property in the district is distributed according to value, after notice and hearing, and all of such property, including the property of the plaintiff-in-error, does or can have the benefit of the improvement on exactly the same requirements. In the Bronx Valley Sanitary Sewer assessment there is no unequal depth of area, because the entire area of each parcel is assessed at its *value*, and there is no vague speculation as to present worth of any parcel in the district, and, finally, there is *much need of the improvement*.

As was stated by Holmes, D. J., in the case of *Gulf & S. I. R. Co. v. Duckworth*, in 280 Federal, 733, at page 736:

"This is not the case of a local assessment or betterment tax, charging the cost of a local improvement upon individual property in proportion to benefits estimated to accrue thereto, but is the case of the creation by authority of the Legislature of a separate special taxing district, which is made to bear the entire cost of a local improvement, to wit, a public highway traversing the entire length of the same. This cost is distributed equally upon the property in the district upon an *ad valorem* basis. If this distinction is kept in mind, it will serve to differentiate most of the cases cited by attorneys for complainant, notably, *Kansas City Southern Railway Co. v. Road Improvement District No. 6*, 256 U. S., 658, 11 Sup. Ct., 604, 65 L. Ed., 715, which is their main authority."

After discussing and quoting from the *Kansas City Southern Railway Company* case, Judge Holmes says:

"Here there is a definite standard for determining the benefits of the proposed im-

provement. The basis for ascertaining the contribution demanded of individual owners is the same as that of the railroad; all property in the district is assessed according to value. The levy of 10 mills is the same for corporate and individual owners. Equal protection of the law is extended to all within the district.

"The question, therefore, narrows itself to whether the creation of the district was a denial of due process or equal protection of the law to complainant, because of the amount of its property embraced in it and because of the boundaries and irregular shape. The statute in question (Laws 1914, c. 176) has been upheld by the Supreme Court of Mississippi in *Prather v. Googe*, 108 Miss., 670; 67 South, 156. Neither is the statute here assailed generally, upon the ground of its unconstitutionality, and palpably upon the hearing which has taken place no relief could be granted upon that ground. 37 Stat., 1013, c. 160, Act March 4, 1913 (Comp. St., §1213). There is no allegation that the complainant ever objected, or was denied the right to object, to the creation of the district, or the inclusion of its property in it, or to the assessment or levy.

"This reduces the matter to whether the creation, under a valid statute, of a special taxing district, with the dimensions named, which includes property fairly assessed at \$2,511,800 for the construction and maintenance of a road at a cost necessitating a 10-mill annual tax on the assessment, about one-fifth of which will be paid by the complainant, is such an arbitrary legislative act and plain abuse of power that it is tantamount to taking complainant's property therein without due process of law, and denying to it the equal protection of the law under the Federal Constitution. Clearly the Legislature has a large dis-

cretion in defining the territory to be deemed specially benefited by a public highway or other local improvement. This court has no power to trespass upon that discretion, or to enlarge or contract the boundaries of the district when formed. The limit of its power is to declare void an arbitrary act, which is so palpably an abuse of that discretion as to be violative of rights protected by the Fourteenth Amendment.

"The bill does not state such a case, and the motion to dismiss will be sustained."

POINT I.

The constitutional right to notice and hearing as to the apportionment of the assessment upon the property of the plaintiff-in-error has been preserved in the statute authorizing the Bronx Valley Sanitary Sewer Assessment.

Chapter 646 of the Laws of 1917, §2 and §3;

Appellate Division Opinion, 193 N. Y. App. Div., 433, 437 (Record, p. 27);

People ex rel. Scott v. Pitt, 169 N. Y., 521;

Fallbrook Irrigation District v. Bradley, 164 U. S., 112;

Spencer v. Merchant, 100 N. Y., 585;

Houck v. The Little River Drainage District, 239 U. S., 254.

Sections 2 to 5 of Chapter 646 of the Laws of 1917 of New York State give to each taxpayer within the district the same right that he now has in the apportionment of the State and County taxes. He is given the right to appear before the Board of Assessors of his particular town or city and be

heard as to the valuation placed upon his property for the purposes of this Act. He is given the right to contest that valuation both as to its effect on his particular property and also on the question of whether it is assessed on the same ratio or basis as the other property within that particular tax district "and perhaps other matters of fact which may go to diminish the tax, or to avoid it altogether" (*Scott v. Pitt*, 169 N. Y., 527), as well as the right to be heard before the Board of Supervisors.

The sections referred to read as follows:

Sec. 2. The annual assessment-rolls in each city or town in whole or in part within the Bronx Valley sanitary sewer district shall be used for the purpose of the Bronx Valley sanitary sewer district tax. In addition to all other requirements of law the assessors in each city and town included in whole or in part within the Bronx Valley sanitary sewer district as defined in this act shall make the annual assessment-rolls in such form, by proper subdivision of the assessment-roll, or by separate columns therefor, or by both of said methods, or otherwise, as shall

(a) Show and identify all lots or parcels of land in such city or town which shall be within the Bronx Valley sanitary sewer district as defined in this act. Among the lots or parcels of land so shown and identified as being within the Bronx Valley sanitary sewer district shall be included all lots or parcels of land exempt or partially exempt from taxation by the provisions of any general, local or special law, with the exception of lots or parcels of land belonging to the United States or used for cemetery purposes and all such exemptions so shown or identified shall be as-

essed for the tax provided for in this act in the manner provided, by law for lots or parcels of land which are not exempt from taxation. If only part of a lot or parcel of land shall be within the limits of such Bronx Valley sanitary sewer district such part shall be separately assessed. If a lot or parcel of land lying wholly within the limits of such Bronx Valley sanitary sewer district shall be divided by a line between two or more tax districts it shall be assessed as provided in the tax law. If only part of a lot or parcel of land shall be within such Bronx Valley sanitary sewer district and such part shall be divided by a line between two or more tax districts the portions of such part lying within each of such tax districts shall be separately assessed herein.

(b) Show separately and as a distinct item the aggregate assessed values of all lots or parcels of land or parts of lots or parcels of land in such city or town which are included within such Bronx Valley sanitary sewer district and assessed in such city or town as herein provided. In such aggregate assessed value shall be included the assessed values of lots or parcels of land otherwise exempt from taxation but which are to be assessed for the tax provided for in this act as herein provided.

(c) Contain a separate column for the extension of such Bronx Valley sanitary sewer district tax or assessment against all lots or parcels of land or parts of lots or parcels of land within such Bronx Valley sanitary sewer district as are shown upon such assessment-rolls as subject to the tax provided by this act and as herein provided. Provided, however, that in the city of Mount Vernon there shall be a separate column for the extension of such tax against all property both real and personal appearing on the assessment-roll of said city

as liable to general taxation and not exempt therefrom.

Sec. 3. At the times and in the manner provided by law, the assessment, rolls of each city or town in whole or in part within the Bronx Valley sanitary sewer district shall be open to inspection, and the assessors of such cities and towns shall hear and determine all complains in relation to the assessments for the tax provided for in this act.

Sec. 4. The Board of Supervisors of Westchester County at its annual meeting shall examine the assessment-rolls of the several cities and towns included in whole or in part within the Bronx Valley sanitary sewer district as defined in this act for the purpose of ascertaining whether the valuations in each of such cities or towns bear a just relation to the valuations in all of the other cities or towns within such Bronx Valley sewer district, and the Board may increase or diminish the aggregate valuation of the real estate in each of such cities or towns shown on the respective assessment-rolls of such cities or towns as located within such Bronx Valley sanitary sewer district using for that purpose the equalization rule provided in the tax law in so far as the same may be applicable.

Sec. 5. In addition to all other powers conferred by law on the Board of Supervisors to correct the assessment-rolls, if it shall be made to appear to the Board of Supervisors upon the verified petition of the assessors of any city or town in whole or in part within the Bronx Valley sanitary sewer district, or to any member of the Board of Supervisors.

First. That real estate in said city or town not within said Bronx Valley sanitary sewer district is shown upon the assessment-rolls to

be within said district the Board of Supervisors may correct the assessment-rolls so as to show that such property is not liable to assessment and taxation for the Bronx Valley sanitary sewer district.

Second. That taxable real estate in such city or town and within the Bronx Valley sanitary sewer district is not shown on such assessment-rolls to be within such Bronx Valley sanitary sewer district the Board of Supervisors shall cause to be personally served on the person or corporation owning such real estate a copy of such petition with notice of presentation thereof to the Board of Supervisors at least ten days before the regular or special meeting of the Board of Supervisors, at which the same will be acted upon, and the Board of Supervisors shall take no action on such petition unless proof of the personal service of such petition and notice be made to them by affidavit. The Board of Supervisors shall give such person or corporation an opportunity to be heard and after such hearing if the Board of Supervisors shall find that the property so referred to in such petition lies within the Bronx Valley sanitary sewer district it shall cause the fact to be indicated upon the assessment-rolls.

Section 2 provides for the method of assessment while Section 3 provides for a hearing *"in relation to the assessments for the tax provided in the Act."*

The Appellate Division of the Supreme Court in their opinion below (Record, pp. 27 and 28) affirms this in the following language:

"It is true that a property owner has the constitutional right to be heard upon the ap-

portionment of the tax as between him and other property owners within the district. This apportionment is usually delegated to some commission or board which has *quasi* judicial powers, upon the exercise of which the property owner is entitled to an opportunity to be heard. But in this case, by adopting the assessment rolls of local assessors the right to be heard as to the proper apportionment is preserved, not only by necessary implication but by section three of the act."

The plaintiff-in-error to sustain its contention quotes at length from *Matter of Union College*, 129 N. Y., 308 (Plaintiff's Brief, pp. 37 and 38). But that case certainly has no controlling influence here for the reason that it involved a statute which did not give *any notice for a hearing*. The act referred to in that case, as stated by Judge Finch at page 312, required the commissioners to make an assessment-roll of the city and insert upon said roll the water rent assessed upon each of the buildings and lots thereon and then file said roll in the office of their clerk, publish notice of the fact that they had done so and deliver the rolls with their warrant attached, to the collecting officer. He then says:

"No hearing or opportunity for a hearing was allowed to the owners or occupants assessed and their only privilege was to pay."

As far as we are able to discover plaintiff-in-error in effect contends that it is entitled to a hearing on the amount of tax it is to pay; that is, a hearing on the actual dollars and cents of its tax.

At pages 38 and 39 of its brief, after quoting from *French v. The Barber Asphalt Co.* case, 181

U. S., page 341, and *Hancock v. City of Muskogee*, 250 U. S., 454, the following is stated:

"The hearing provided by Section 3 of Chapter 646 of the Laws of 1917 is in no way a hearing on apportionment of the tax for the provision that 'the assessors of such cities and towns shall hear and determine all complaints in relation to the assessments for the tax provided for in this act,' leaves the assessors powerless to pass upon the apportionment of the assessment against particular property, *for all of the assessments must by the act itself be fixed by said roll; that is, a proportionate assessment against each property upon the value of the property, with the improvements, if any, as fixed by the assessors for purposes of general taxation.*"

It is evident that the plaintiff-in-error loses sight of the fact that the hearing as to the apportionment of the tax provided for by the constitution is as applied to this case a hearing in reference to the value of property against which by mechanical operation the tax is determined, and not a hearing as to the dollars and cents actually paid.

We believe the constitutional requirement is satisfied when the taxpayer has notice at some stage of the proceeding as to the apportionment of the tax he is to pay. If the tax is to be levied on the basis of value, a notice of hearing on the value of his property as assessed is sufficient.

He can then be heard as to whether his share of the tax is to be on the basis of a value of ten thousand dollars or one thousand dollars or any other sum, as well as whether or not his property is within the district, whether he is the owner of the property, or other matters.

The Court of Appeals of the State of New York in the case of *People ex rel. Scott v. Pitt*, 169 N. Y., 521, settled this question of notice and hearing as to apportionment for all times, and in an opinion written by Judge O'Brien says (pp. 527, 528) :

"The principle that the citizen cannot be deprived of his property without due process of law is applicable to all laws for imposing taxes; but only to this extent and in this sense, that before he is required to pay the tax or assessment, or before it shall be deemed to be conclusively established against him, he shall have notice of the proceeding and an opportunity to be heard before some board or official body competent to review the proceedings or to redress any just grievance that he may have upon the facts. But the rule or principle of apportionment is a question that rests wholly with the Legislature when enacting a law, and the citizen has no absolute right to a hearing upon that question any more than he is entitled to be heard upon the selection by the Legislature of the subjects of taxation. In the enactment of the law he is represented, and while it may be usual and proper for a law-making body to hear arguments as to measures of taxation *pro* and *con* through committees or otherwise, such hearing cannot be demanded as a legal right.

"The Legislature of this State has from time immemorial enacted bills at each session providing for the imposition of the annual taxes upon the principle that each hundred dollars of property should contribute a designated fraction of a cent or mill, more or less, according to the necessities of the government as the sum which every owner of property must pay in order to defray the expenses and charges of government. *Before the tax thus imposed becomes conclusive against the property own-*

er, he is entitled to a hearing upon certain questions; that is to say, he must be permitted at some stage of the proceeding to show that he owns no property, or if he does that it is valued unequally, or excessively or that he does not reside within the district where he has been assessed, and, perhaps, other matters of fact which may go to diminish the tax, or to avoid it altogether. But he is not entitled to be heard at any stage upon the justice or propriety of the principle upon which the tax is to be apportioned; that is to say, he cannot question the justice of the power to impose the tax for one mill or a fraction of a mill, as the case may be, upon each hundred dollars of taxable property. That question was absolutely within the discretion of the Legislature, and after the law is enacted it is the expression of the sovereign will and in principle very much like the decree which we are told went forth from Caesar Augustus that the whole world should be taxed. It differs from it only in this, that it does not proceed from imperial authority wielded by a single individual, but from the representatives of the people in the Legislature, to be carried into effect according to fixed laws and in compliance with established principles intended to secure the citizen from unjust or unequal exactions. But in spite of all the precautions that the wit of man has ever been able to devise, taxation cannot be made to operate equally or justly upon every individual. Whatever rule or principle is adopted for the distribution of the burden there will still be cases where one man pays more and another less than his share. No principle of apportionment can be adopted that will not in some degree be open to this objection; and, hence, a rule or basis for the distribution of the burden must, in the absence of some constitutional restriction, be a matter of legislative discretion. The principles that

apply to taxation for general purposes apply also with equal force to taxation for local purposes or local improvements. In both cases the basis of the apportionment must be found in the law, and when expressed, whatever the principle may be, whether based upon benefits, the value of property, some fixed percentage of cost of the work or upon frontage measured by the width of each lot affected by the improvement, the discretion of the Legislature in adopting the principle is conclusive upon the Court, the local authorities and the property owners." (Italics ours.)

The plaintiff-in-error quotes from *French v. Barber Asphalt Paving Company*, 181 U. S., at 341, as follows (Plaintiff's Brief, p. 38):

"The right which he (the property owner) thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which he is to pay."

That part of the opinion from which it was taken reads as follows:

"It has been held in this Court that the Legislature has power to fix such a district for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local, public improvement. The Legislature, when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district, and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax, *i. e.*, the amount of the tax which

he is to pay (citing) *Paulsen v. Portland*, 19 U. S., 30, 41."

We contend that when taken as a whole, the paragraph is a complete answer to the argument of plaintiff-in-error on *apportionment*, especially when we read that part of the opinion in the *Paulsen* case referred to as the authority for such statement and which reads as follows:

"It is settled that, if provisions is made 'for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'"

Citing:

McMillen v. Anderson, 95 U. S., 37;

Davidson v. New Orleans, 96 U. S., 97;

Hagar v. Reclamation District, 111 U. S., 701;

Spencer v. Merchant, 125 U. S., 345.

The foregoing quotation from *French v. Barber Asphalt Paving Company* is a verbatim copy from the opinion in the *Fallbrook Irrigation District v. Bradley*, 164 U. S., at pages 175, 176. In the latter case the statute under consideration was one which provided for an *ad valorem* tax, that is to say, a tax to be determined according to value, and so far as applicable thereto it is set forth in the United States reports, Lawyers' Edition, Vol. 41, pages 372 and 373. This Court in that case specifically held that a tax imposed on the basis of value, with a provision for a hearing as to value, satisfied the requirements of the Constitution.

This Court in that case held (p. 175) :

"As to a hearing upon the question of apportionment, the Act in Sections 18, 20 and 21, provides a general scheme for the assessment upon the property included in the district, and it also provides for a notice by publication of the making of such assessment, and an opportunity is given to the taxpayer to be heard upon the question of the valuation and assessment, and to make such objections thereto as he may think proper, and after that the assessors are to decide.

"Thus the act provides for a hearing of the land owner, both as to the question whether his land will be benefited by the proposed irrigation, and when that has been decided in favor of the benefit, then upon the question of valuation and assessment of and upon his land included in the district. As to other matters, the district can be created without notice to anyone. Our conclusion is that the act, as construed, with reference to the objections considered under this third head is unassailable."

Under the Statute here under consideration the Legislature defined the district of assessment within which is included property of the plaintiff, declared that all property therein was benefited, directed that the tax should be paid on the basis of value, giving the taxpayer the right to a hearing in reference to such assessed value by which his proportionate share of the tax is to be determined.

The Courts of the State of New York from the earliest time have had before them in one phase or another this same identical question and they have uniformly and apparently without exception decided that where by legislative act the district has been fixed and provision made for the levying

of the tax be it by property valuation or otherwise that the constitutional requirement has been satisfied if provision for a hearing at some time before the tax becomes a lien has been provided for.

The courts of the State of New York have so held and in the case at bar have reiterated it, even though without opinion (*Valley Farms Co. v. County of Westchester*, 231 N. Y., 558).

We repeat, therefore, that the Bronx Valley Sanitary Sewer statutes do provide for notice and hearing upon the apportionment of the Bronx Valley Sewer assessment and that the said statutes are, therefore, constitutional in so far as that objection is concerned.

See also:

People ex rel. Griffin v. The Mayor, 4 N. Y., 419;

Howell v. City of Buffalo, 37 N. Y., 367;

Matter of Antwerp, 56 N. Y., 261;

Matter of Cruger, 84 N. Y., 619;

Genet v. City of Brooklyn, 99 N. Y., 296;

Spencer v. Merchant, 100 N. Y., 585; affirmed 125 U. S., 345.

POINT II.

The act in question is constitutional, even though the property of the plaintiff-in-error, assessed on the same basis as all other property cannot make use of the sewer for the whole length by connecting with it at its source and like all other property owners in the district have been or will be required to construct the necessary subtrunk or lateral sewers in order that its property may drain into it.

- Appellate Division Opinion*, 193 N. Y. App. Div., 433 (Record, p. 27);
Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S., 55;
Kansas City So. Ry. Co. v. Road Improvement District No. 6, 256 U. S., 658;
Myles Salt Co., Ltd. v. Board of Commissioners, 239 U. S., 478;
Houck v. Little River Drainage District, 239 U. S., 254;
Wagner v. Baltimore, 239 U. S., 207;
Spencer v. Merchant, 125 U. S., 345; affirmed 100 N. Y., 585;
N. Y. C. & H. R. R. Co. v. City of Rochester, 129 N. Y. App. Div., 805; affirmed 198 N. Y., 570.

It is admitted by plaintiff-in-error that it has both *present* and *future* access to the Bronx Valley Sanitary Sewer (Complaint, Record, p. 18; Plaintiff's Brief, pp. 42 and 46), and we, therefore, fail to see how the plaintiff-in-error's argument in regard to the validity of this act can be questioned upon the ground that it does not have a complete

use of the sewer, either because of the lack of a sub-trunk or lateral sewer, or because of the fact that it cannot use said sewer for its entire length.

The opinion of the Court below (193 N. Y. App. Div., 433, Record, p. 27), affirmed 231 N. Y., 558, reads as follows:

"The complaint concedes that all the land lying within the boundaries of the tax district as established by the Act of 1917 has now, or may by the construction of a trunk sewer have access to the outlet sewer forming part of the so-called Bronx Valley sewer. There is, therefore, a basis for the exercise of the legislative discretion in including this land within the tax district. It is not arbitrary, wholly unwarranted, or a flagrant abuse resulting in the confiscation of the plaintiff's property, to determine that this land is benefited by the existence of the sewer. It may be that a Court would not reach the same conclusion as the Legislature, and that the benefits conferred upon this portion of the district are much less than upon other portions. Conceding this, there nevertheless is a substantial basis for the exercise of the legislative discretion; and notwithstanding the constitutional limitations that the United States Supreme Court in its recent decisions has placed upon the legislative power to include property within the limits of a tax district, the facts alleged in the complaint do not show that the Legislature has passed beyond the constitutional limits of its power in this respect."

It is evident to us that the plaintiff is displeased because the Legislature of the State of New York did not zone the Bronx Valley Sanitary Sewer district and make provisions so that it would only

have to pay not on the same basis as other property owners but on some sort of speculative basis because of the fact that its property is not so situate in the district that it can connect with the sewer at its source.

Section I of Chapter 646 of the Laws of 1917 specifically provides:

"All lots or parcels of and within such district or area are declared to be benefited by the construction and maintenance of the trunk sewer and outlet sewer constructed and maintained under the provisions of the act and the amendments thereto to which this act is a supplement."

In other words, the Legislature in this particular case has fixed the territory and declared that all property therein is on the basis of value benefited alike.

The plaintiff cites a large number of cases holding certain assessments for special benefits unconstitutional and void.

It should be noted that every one of these cases are applicable to a statute where the Legislature had left some one or more of the three elements, namely:

- (a) Territory to be assessed.
- (b) Benefits conferred.
- (c) Method of apportionment.

to be otherwise determined by some board, body or commission.

This court in the three principal cases relied upon by the plaintiff-in-error has held that such board, body or commission had not equitably and

justly found all of the facts and made a just determination.

The three principal cases relied upon by the plaintiff-in-error to sustain its contention that the act in question is unconstitutional are:

Myles Salt Co. Ltd. v. Board of Commissioners, 239 U. S., 478.

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S., 55.

Kansas City So. Ry Co. v. Road Improvement District, 256 U. S., 658.

In each of these three cases this Court held that the tax or assessment was invalid not upon the grounds that the statute authorizing it was arbitrary and a plain abuse of power, but that the method used under the statute by some board, body or commission claiming the right to act thereunder was an arbitrary action.

In the *Gast Realty Company case*, 240 U. S., 55, which was paving assessment case, the assessment was held invalid not due to the general principle involved (as will be shown hereafter) but due to the manner or method of its application as affecting that particular case. The general purpose of the ordinance which had been drafted in accordance with the statute was to produce equity and justice, but in that particular case it worked a grave injustice between adjoining property owners and of necessity in a city like St. Louis included property which did not, could not and would not by virtue of the growth and subdivision of the property assessed procure any benefit by reason of such paving.

The assessment in said *Gast* case was held in-

valid as to that part of it which assessed three-fourths of the total cost according to the area to be determined in accordance with the provisions of the ordinance. The area as determined made one taxpayer pay on an area figured at a depth of approximately five hundred feet, while his adjoining neighbor paid on an area of approximately only one hundred feet. The fact that the decision of this Court was based upon conditions that existed in that particular case and by reason of those conditions only, reference should be made to the case of *Withnell v. Ruecking Construction Company*, 249 U. S., 63, which was a decision of the United States Supreme Court affecting the same improvement only in connection with a separate or different property owner. This Court said in the *Withnell* case, at page 67, referring to the *Gast Realty Company* case:

"In that case, the assessment was held invalid in part."

and at page 68, the Court said:

"In the *Gast Realty Company* case the area assessment was held invalid because it assessed a large and disproportionate part of the plaintiff-in-error's property."

and this Court again said at page 69:

"When the assessment is made in accordance with a fixed rule adopted by legislative act, a property owner is not entitled to be heard in advance on the question of the amount and extent of the assessment and the benefits conferred."

and again on page 70, this Court said:

"We reach the conclusion that the attack upon the validity of the assessment for want of advance notice of hearing as to benefits must fail."

and again on page 71:

"The lots assessed are by no means uniform in size, nor is their relation to the improvement uniformly alike. Some of the blocks, including some of the plaintiff-in-error's, are not subdivided into lots, and are irregular in shape. But we are not prepared to hold that the assessment district was so laid out with reference to plaintiff-in-error's property as requires this Court to declare the application of the area rule a denial of due process of law, or of the equal protection of the laws. * * * The attack upon constitutional grounds because of the system which the charter authorized in making the assessment can only succeed if it has produced results, as to plaintiff-in-error's property palpably arbitrary or grossly unequal. * * * Its application in the instance passed upon in *Gast Realty Co. v. Schneider Granite Co.*, 240 U. S., *supra*, was found to work so arbitrarily as to require an avoidance of the area assessment upon constitutional grounds."

To enable the plaintiff in the case at bar to bring itself within the decision of the *Gast* case, it would have to show that its property was assessed disproportionately to its neighbor's and the statute would have to provide that its property should be assessed for full value, while its neighbor's at twenty per cent. of its value. That was the condition in the *Gast* case which caused this Court to hold that

the parties were taxed disproportionately. No such condition is shown or can be shown in this case. If there was such an unequal assessment, the hearing allowed the plaintiff by the act here in question would be the time and place to remedy such inequality.

In the case of *Myles Salt Co., Ltd. v. Board of Commissioners*, 239 U. S., at page 485, this Court said:

"It is to be remembered that a drainage district has the special purpose of the improvement of particular property, and when it is so formed to include property *which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation.*" (Italics ours.)

Citing,

Wagner v. Baltimore, 239 U. S., 207.

In the case of *Kansas City Ry. Co. v. Road Improvement District*, 256 U. S., at page 660, 661, this Court said:

"The statute under consideration prescribes no definite standard for determining benefits from proposed improvements. The assessors made estimates as to farm lands and town lots according to area and position and wholly without regard to their value, improvements thereon, or their present or prospective use. On the other hand, disregarding both area and position, they undertook to estimate benefits to the property of plaintiffs-in-error without disclosing any basis therefor, but apparently

according to some vague speculation as to present worth and possible future increased receipts from freight and passengers which would enhance its value considered as a component part of the system."

The public purpose for which the tax is levied is *supposed* to result in some *benefit* to the taxpayers *as a class*; but there is no requirement that the individual taxpayer shall receive a *quid pro quo*. (*The People v. Mayor, etc. of B'klyn*, 4 N. Y., 419; *Ghent v. B'klyn*, 99 N. U., 296, 307; *Houck v. Little River Dist.*, 239 U. S., 254, 265).

If the Legislature believes that the cost of a public work should be paid for by a tax on property not embraced in any recognized political subdivision of the State, it may create a new taxing district embracing in the district such property as it *deems* specially benefited by the improvement (*Horton v. Andrus*, 191 N. Y., 231, 237), but there is no requirement that the tax on such a special taxing district shall be apportioned according to the real or supposed benefits accruing on any particular taxable lot. The Legislature may, and frequently does, direct that the amount of taxes imposed on any particular lot shall not exceed the benefits, but it is not obliged to do so; it may provide that the apportionment of the tax shall be on a basis of a percentage of the assessed valuation; thus entirely disregarding any theory of *quid pro quo*, or the actual benefits to any particular lot of land assessed. (*Horton v. Andrus, supra*; *Houck v. Little River Dist., supra*.) The Legislature may also provide that the entire cost of an improvement shall be assessed by what is known as the front foot rule, which precludes inquiry into the *actual benefit* to any particular parcel of land assessed.

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It is true that assessments for local improvements are theoretically based on benefits, but the benefits may be as illusory as the benefits from general taxation (*Lewis Eminent Domain*, 3rd Ed., §5). In view of the wide latitude of Legislative power in many instances it is impossible to make a logical distinction between a tax and a special assessment. Suppose the Legislature directs the laying out of a public park in a certain locality and directs that the cost shall be paid by a county or a town tax. The majority of the taxpayers in either case may receive little or no benefit, but the park is a public purpose and a benefit is *presumed* to exist and surely no one would claim that the Legislature had exceeded its powers. Suppose, on the other hand, that the Legislature determined that the burden of the cost should be borne by a larger or smaller area than a county or town, fixed the boundaries of the district to be taxed, and prescribed an *ad valorem* tax on all property within the district, how is this to be distinguished from a town or county tax and why should the taxpayer in one case be exempt from the tax on the ground that it exceeded his actual benefits, when he could not claim exemption on the same ground in the other case.

In the case of *Stuart v. Palmer*, 74 N. Y., 183, it was decided that the assessment was invalid because of the fact that the statute itself did not provide for and no notice was given to the taxpayer. Furthermore, the sequel to the case of *Stuart v. Palmer* is to be found in the case of *Spencer v. Merchant*, 100 N. Y., 585, affirmed by this Court in 125 U. S., 345, in which case this Court held that an act which determined the specific property

benefited and fixed the amount of their assessment was constitutional. For the purpose of a sidelight on the case of *Stuart v. Palmer*, it might not be amiss to say that the *Spencer v. Merchant* case compelled the property owners to pay the tax that they should have paid, or would have paid had it not been for the decision of *Stuart v. Palmer*, which affected the same improvement. In other words, those taxpayers, who by virtue of the decision in the case of *Stuart v. Palmer*, were relieved from paying their assessment were compelled to pay that same assessment by virtue of the *Spencer v. Merchant* case, which held the Act of 1881 of the Legislature constitutional.

As stated before, plaintiff contends that the assessment against its property was not laid by due process of law because

1. Its property is so situate in the district that it does not have the use of the sewer for its entire length.
2. Whatever connection it can make to the sewer is to that part of the Bronx Valley Sewer termed the outlet part.
3. The benefit it secured is not proportionate to the benefit to the property situate at the northerly end of the sewer, or trunk part.
4. It will be necessary for it to build a connecting sewer in the Tibbets Valley in order that its property may enjoy the use of the Bronx Sewer.

The fixing of the benefited are for a sewer district does not require that a different rate be established for one who uses the sewer for its

entire length than is established for one who uses the sewer for only a part of its length. The entire district is the unit of assessment and counsel for plaintiff can point to no case which holds to the contrary unless by statute a special provision is made under special circumstances and zones or similar divisions are created by the act.

The fact that connections may be made to this sewer both to what is denominated the trunk sewer and the outlet sewer was recognized by the original act and has been retained in all amendments thereto and is to be found in Section 14 thereof, which provides as follows:

"Any lands of each town and city in the Bronx River Valley outside the natural sewerage area of the Bronx River shown on the map filed by the Commissioners as required by this Act, which may become connected with the sanitary trunk sewer in said valley, or with said outlet sewer from the Bronx Valley to the Hudson River, or have the use thereof for sewerage shall be included in the sewerage area of such towns or city as lands benefited by said sewerage system and be subject to levy and assessment as provided in this Act."

As a matter of fact there is in reality no difference between the trunk sewer and the outlet sewer, except in name only. It takes both parts to make a whole. Connections may be made to either and the only purpose for the sewer itself was to take care of the sewage that arises within the benefited area, namely, the area which the Legislature itself has denominated as benefited.

The only question of fact which can arise in this case is whether or not the sewer is available

for use by the property of the plaintiff-in-error, and as to this question the plaintiff is foreclosed because by paragraphs fourteen and fifteen of its complaint (Record, pp. 14 and 15) it is admitted that the property is in Tibbits Valley and that some of it does use at the present time this sewer, and, as a matter of fact, plaintiff-in-error by its brief admitted that some of its property is within the Lincoln Park section and does at the present time use this sewer (Plaintiff's Brief, pp. 42 and 46), and the only requisite for the plaintiff's other property in this Tibbits Valley to obtain the full benefit and use of this sewer is to continue sub-trunk and lateral sewers which are now draining a portion of this valley so that such property of the plaintiff may connect therewith.

The contention of the plaintiff that it will be necessary to build a trunk sewer in the Tibbits Valley in order to obtain any benefit from the Bronx Valley Sewer is beside the question, for the reason that such a sewer would not be a trunk sewer, but would be a sub-trunk, a lateral or connecting sewer just the same as it is, has been or will be necessary for the City of White Plains, a portion of the City of Yonkers, a portion of the City of Mount Vernon and a portion of the towns of Greenburgh, Scarsdale and Eastchester to build connecting sewers two or three times longer than necessary to be built in the Tibbits Valley in order that all the property within the defined and benefited area can properly sewer into the Bronx Valley Sewer.

It seems to us that it is needless to burden the Court with a large number of cases and long extracts from opinions on this subject, but in the

end it will probably be better to cite a few of the leading cases and quote therefrom. The magnitude of the question involved without doubt justifies such action.

In the case of *N. Y. C. & H. R. R. R. Co. v. The City of Rochester*, 129 A. D., 805, affirmed by the Court of Appeals in 198 N. Y., 570, upon the opinion of Judge Williams in the Court below, the Court held in substance on page 807 that it is settled by both the Federal and State decisions that the Legislature had power to determine that an improvement should be made, the amount necessary to pay the expense, *the territory to be benefited* and the class of persons and property to be assessed and the amount to be assessed to each class. It then said:

"It may determine them itself, and having done so, its action is not open to review by the courts. It cannot be shown to be even mistakenly unjust."

Judge Williams in his opinion refers to the case of

Stuart v. Palmer, 74 N. Y., 183, and
Spencer v. Merchant, 100 N. Y., 585, affirmed 125 U. S., 345.

and says that these cases relate to the same improvement.

He further says that the *Stuart v. Palmer* case was held unconstitutional because the question of benefits was left to Commissioners without any provision for notice of hearing. He then refers to Chapter 689 of the Laws of 1881, which provided that the amounts cancelled by the former act that was held unconstitutional should be apportioned

and levied against the lands where the amounts had been cancelled and calls attention to the fact that in the case of *Spencer v. Merchant* this act was held constitutional. Quoting at page 809 of the case, he said:

"The Act of 1881 determines absolutely and conclusively the amount of tax to be raised and the property to be assessed, and upon which it is to be apportioned. Each of these things was within the power of the Legislature, whose action cannot be reviewed in the courts, upon the ground that it acted unjustly or without appropriate and adequate reason.

* * * The Legislature may commit the ascertainment of the sum to be raised and of the benefited district to Commissioners, but it is not bound to do so, and may settle both questions for itself; and when it does so, its action is necessarily conclusive and beyond review.

* * * The question of special benefit and the property to which it extends is of necessity a question of fact, and when the Legislature determines it, in a case within its general powers, its decision must, of course, be final."

The plaintiff, in the case of *Spencer v. Merchant*, 100 N. Y., 585, claimed that those assessed had no opportunity for hearing, but that Court said, at page 589:

"But that objection becomes a criticism upon the action of the Legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission *that* is a hearing never granted in the process of taxation. The Legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confined to its

jurisdiction. It may err, but the courts cannot review its discretion."

This case of *Spencer v. Merchant* was affirmed by this Court and a large portion of the opinion of the Court of Appeals was quoted with approval by this Court, 125 U. S., at page 356, saying:

"When the determination of the lands to be benefited is entrusted to Commissioners, the owners may be entitled to notice and hearing upon the question whether their lands are benefited and how much. But the Legislature has the power to determine, by the statute imposing the tax, what lands which might be benefited by the improvement, are in fact benefited; and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, and its apportionment among the different parcels of the class which the Legislature has conclusively determined to be benefited."

In the Statute of 1881, referred to in *Spencer v. Merchant*, the Legislature itself determined what lands were benefited and should be assessed. By that statute, the Legislature in substance and effect assumed that all lands within the district defined in the Statute of 1869 were benefited in a sum equal to the amount of the original assessment, the expense of levying it and interest thereon; and determines the lands upon which no part of that assessment had been paid and which had, therefore, as yet borne no share of the burden were benefited to the extent of a certain portion of this sum. That these lands as a whole had been bene-

fited to this extent was conclusively settled by the Legislature.

Another contention on behalf of the plaintiff-in-error in this case is that its property should be constituted a separate tax district with a different and reduced tax rate. The reply to that is that the Legislature having determined this matter and having determined that all the property within the district is benefited, the action of the Legislature cannot be overthrown.

As was said in the case of *Mount St. Mary's Cemetery v. Mullins*, 248 U. S., 501, at page 505:

"It is well settled that unless such assessment is arbitrary and unreasonable, *the extent of the benefit*, essential to justify the assessment, was a matter within the control of the local authorities." Citing *Spencer v. Merchant*, 125 U. S., 345, 356; *Wagner v. Baltimore*, 239 U. S., 207. (Italics ours.)

"This case is not within the principle of *Myles Salt Company v. Iberia Drainage District*, 239 U. S., 478, where it was sought to embrace property in no wise benefited within the limits of a drainage district. It is contended that the Cemetery Association might have been made a sewer district of itself and not have been included in so large a district. Again, this was a matter for the local authorities to decide, and in the absence of arbitrary action, their judgment was conclusive."

We contend that the Legislature having fixed the district, declared that all the property within it was benefited; that its judgment was exercised and is conclusive and that it cannot with very good grace be held to be an arbitrary action when the plaintiffs themselves admit that they have the use of this sewer the same as other sections and

that the only difference is that their connection therewith will be to that part of the sewer known as the outlet sewer and not to the part called the trunk sewer, and that their sewage will not have an opportunity of flowing the entire length of the sewer (Record, p. 15).

In the case of *Spencer v. Merchant*, 100 N. Y., 585, at page 587, the Court said:

"The lands might have been benefited by the improvement, and so the legislative determination that they were, and to what amount or proportion of the cost, even if it may have been mistakenly unjust, is not open to our review. The question of special benefit and the property to which it extends is of necessity a question of fact, and when the Legislature determines it in a case within its general power, its decision must, of course, be final."

In *Houck v. Little River Drainage District*, 239 U. S., 254, 265, this Court said:

"When local improvements may be deemed to result in special benefits, a further classification may be made and special assessments imposed accordingly, but even in such a case there is no requirement of the Federal Constitution that for every payment there must be an equal benefit. The State in its discretion may lay such assessments in proportion to position, frontage, area, market value, or to benefits estimated by commissioners."

In the *Matter of Shaffer*, 138 App. Div., 35, affirmed by the Court of Appeals, without opinion, 200 N. Y., 519, the Appellate Division affirming the case upon the opinion of Mr. Justice Kelly at Special Term, said at page 40:

"Where assessments for benefit must be

collected from the property benefited the tax is not always restricted to the very district concerned. There are cases where the character of the improvement is such that there may be differences of opinion as to the propriety or justice of its being provided for by a small district or a large one. 'In no part of the law of taxation has the practice of our State governments left the discretion of the Legislature more entirely unfettered than in laying and apportioning such assessments, and the case must be most extraordinary and clearly exceptional to warrant any court in declaring that the discretion has been abused and the legislative authority exceeded' (Cooley Taxation, 2nd Ed., 145). One of the requisites of taxation is the laying down of a rule by which to measure the contribution which each of the subjects selected for taxation shall make. This rule only the legislative power of the State is competent to prescribe and apportionment thereof is always an act of legislation (*id.*, 237). It is conceded that the legislative judgment that a certain district is, or will be, so far specially benefited by an improvement as to justify a special assessment is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against such conclusions is to invoke the judicial authority to give its judgment controlling effect over that of the Legislature in a matter of the apportionment of a tax which, by concession on all sides, is purely a matter of legislation. This is inadmissible in any case where the legislative action is not manifestly colorable and arbitrary (*id.*, 661)."

POINT III.

Assessments made under this act on the basis of value without regard to frontage, depth of property, or distance from the sewer are not arbitrary.

Kansas City So. Ry. v. Road Improvement District, 256 U. S., 658, 660;

Hancock v. City of Muskogee, 250 U. S., 454;

Branson v. Bush, 251 U. S., 182;

Miller and Lux v. Sacramento and San Joaquin Drainage District, 256 U. S., 129;

Gulf and S. I. R. Co. v. Duckworth, 280 Fed., 733.

As we understand the contention of plaintiff-in-error in this connection, it is to the effect that *value* is not the proper basis for levying the Bronx Valley Sanitary Sewer assessment.

It is well settled that the distribution of such a tax according to the *value* of the property benefited is a matter of legislative discretion. The more recent cases settling for all times this rule are:

Hancock v. Muskogee, 250 U. S., 454, 456;

Kansas City So. Ry. Co. v. Road Improvement District #6, 256 U. S., 658, 660.

Mr. Justice Pitney very emphatically lays down this rule in his opinion of the Court in the *Hancock* case, at page 459, as follows:

“And it is settled by the cases above cited that whether the entire amount or a part only of the cost of a local improvement shall be im-

posed as a special tax upon the property benefited, and whether the tax shall be distributed upon a consideration of the particular benefit to particular lots or apportioned according to their frontage upon the streets, *their values*, or their area is a matter of legislative discretion. * * * (Italics ours.)

Mr. Justice MacReynolds reiterates this same rule in his opinion for the court in the *Kansas City So. Ry. Co* case, at page 660, as follows:

"Ordinarily the levy may be upon lands specially benefited according to *value*, position, area, or the front foot rule.

French v. Barber Asphalt Co., 181 U. S., 324, 342;

Cass Farm Co. v. Detroit, 181 U. S., 396, 397;

Louisville and Nashville R. R. Co. v. Barber Asphalt Co., 197 U. S., 430;

Withnell v. Ruecking Cons. Co., 249 U. S., 63;

Hancock v. City of Muskogee, 250 U. S., 454;

Branson v. Bush, 251 U. S., 182."

This legislative discretion is only subject to judicial relief in cases of actual abuse of power or of substantial error in executing it but such is not the case here.

See

Hancock v. City of Muskogee, 250 U. S., 454, 459;

Gast Realty and Investment Co. v. Schneider Granite Co., 240 U. S., 55.

This Court further said in the *Kansas City So. Ry. Co.* case, at page 660:

"If, however, the statute providing for the tax is 'of such a character that there is no *reasonable presumption that substantial justice generally will be done*, but the probability is that the parties will be taxed disproportionately to each other and to the benefit conferred the law cannot stand against the complaint of one so taxed in fact.'" (Italics ours.)

Gast Realty Co. v. Schneider Granite Co., supra.

It is the contention of the defendant-in-error that under the settled law as laid down by this Court, judicial relief cannot be granted the plaintiff-in-error exempting its property from the Bronx Valley Sanitary Sewer assessment because of the fact that such assessment is laid on the basis of *value* without regard to frontage, depth of property, or distance from the sewer. If the plaintiff-in-error could secure such a ruling in this case, the legislature would then be restricted in its power of taxation and there would be no legal way in which a trunk sewer like the one in question could be laid with provisions for a fairly equitable adjustment by way of assessment for the paying therefor.

As we interpret the position of the plaintiff-in-error evidenced by its argument in this case, it seems to desire to pay a small proportionate share only for such part of the Bronx Sewer as runs from its property lines to the outlet and then only after the rest of the district has paid for building sub-trunk and lateral sewers through its property, without regard to the other property owners in the

district who either have or will have to build and pay for their own sub-trunk and lateral sewer in order that the sewer may be available to their property.

This Court in the case of *Webster v. Fargo*, 181 U. S., at page 395, said:

"But we agree with the Supreme Court of North Dakota in holding that it is within the power of the Legislature of the State to create special taxing districts and to charge the cost of the local improvement, in whole or in part, upon the property in said districts, either according to valuation or superficial area, or frontage, and that it was not the intention of this Court, in *Norwood v. Baker*, to hold otherwise."

In the case of *Fallbrook Irrigation District v. Bradley*, 164 U. S., 112, Mr. Justice Peckham, writing for this Court, said at pages 176 and 177:

"It is insisted that the basis of the assessment upon the lands benefited, for the cost of the construction of the work, is not in accordance with and in proportion to the benefits conferred by the improvement, and, therefore, there is a violation of the constitutional amendment referred to, and a taking of the property of the citizen without due process of law.

"Although there is a marked distinction between an assessment for a local improvement and the levy of a general tax, yet the former is still the exercise of the same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment, as being in violation of the State Constitution, yet as the State Court has held them to be without force, we follow its judgment in that case, and our attention must be directed to the

question whether any violation of the Federal Constitution is shown in such an assessment. Can an *ad valorem* assessment on the land benefited, or, in other words, can such an assessment as is provided for in Sections 18, 20, 21 and 22 of the Act be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an *ad valorem* method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not. *It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, which is open to the discretion of the State Legislature, and with which this Court ought to have nothing to do.* The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and from a case of taking property without due process of law.

"In the case of *Davidson v. New Orleans*, *supra*, the assessment, with which this Court refused to interfere, was for a local improvement (reclaiming swamp lands), and by Section 8 of the Act of the Legislature of Louisiana passed in 1858, Laws of Louisiana, 1858, 114,

such a uniform assessment was levied upon 'the superficial or square foot of lands situate within the draining section or district of such board' as would pay for the cost of construction. The effect of this provision was that each foot of land in the whole district paid the same sum as any other foot, although the assessment was founded upon the theory of an assessment for benefits. It was complained that the amount assessed upon plaintiff's lands was excessive, and that part of them received no benefit at all, and it was to that argument that the reply was made that it was a matter of detail so far as this Court was concerned, *i. e.*, it was not a constitutional question, and therefore was not reviewable here, 96 U. S., at page 106.

"In *Walston v. Nevin*, 128 U. S., 578, an assessment was laid upon lands for benefits received from construction of a local improvement, according to the number of square feet owned by the land owner. It was urged that it was not an assessment governed by the amount of benefits received, but was an absolutely arbitrary and illegal method of assessment. This Court held the objection not well founded and that the matter was for the decision of the Legislature, to which body the discretion was committed of providing for payment of the improvement." (*Italics ours.*)

The plaintiff-in-error contends that the Legislature did not have the constitutional right to make *value* the basis of assessment, because the plaintiff's property could not use the sewer until there had been constructed the necessary sub-trunk and lateral sewers. The Bronx Valley Sanitary Sewer is what its name signifies, namely, a *trunk sewer*; and no section of the district can use it until the necessary sub-trunk and lateral sewers have been laid and connected. If such sub-trunk and lateral

sewers had been laid, would it be contended that the district in which they were so laid should be reimbursed for them, or their ratio of assessment made different because they had been so laid? Most assuredly not. If the contention of the plaintiff is correct, then each section or local sewerage area whether sewered or not would be entitled to the same consideration either because they had paid for or would be required to pay for such sub-trunk or lateral sewers.

Again the plaintiff-in-error contends that because the sewage from its property would only flow through or use about one-tenth of the entire length of the sewer that it should not pay as much as a party using the trunk sewer for practically its entire length. In other words, that there should be a different ratio of assessment for each section according to the number of rods of the main sewer used. Such an argument is without merit. It is an admission of a benefit to plaintiff's property and an admission that the sewer is usable.

The claim is made that because (a) a sub-trunk or lateral sewer is needed in order that plaintiff's property may use the Bronx sewer, and (b) that it cannot use the sewer for the full length thereof; that there has been an arbitrary and unwarranted exercise of legislative power. The principle of the *Gast* case is invoked to sustain these claims. The claimant in the *Gast* case under the law paid on the same frontage for a street pavement five times as much by the area assessment as did its neighbor, this by reason of the depth of its property used for determining area and the Court held that an assessment so grossly unequal should not be allowed to stand. As before stated the Statute in the case at bar would have to provide that of two

adjoining pieces of property one would have to pay on full value and the other on twenty per cent. of value in order that the cases be analogous.

The contention of the defendant-in-error here is that the Appellate Division of the Supreme Court in its opinion sustaining the constitutionality of this act clearly, concisely and correctly sets forth the proper rule applicable to this case in the following language (Record, page 27) :

“Under the authorities cited the legislature has undoubted power to prescribe the method under which the assessment shall be laid for the purpose of taxation. In this case it is based on value as shown by the assessment rolls of the cities and towns wholly or partly within the sewer district. The plaintiff claims that equal protection of the law requires that the assessment should be laid on some basis other than value * * * I can imagine no reason why the legislature should not decide that the assessment may be properly based on value. * * * This is a question for legislative determination and if I thought the method led to injustice, which I do not, I could not substitute my judgment for that of the legislature.”

POINT IV.

Assessments made under this act on the basis of value without regard to whether the property is improved or unimproved are not arbitrary.

Hancock v. City of Muskogee, 250 U. S., 454;

Webster v. Fargo, 181 U. S., 394;

People ex rel. Scott v. Pitt, 169 N. Y., 521;

Fallbrook Irrigation District v. Bradley, 164 U. S., 112;

Appellate Division Opinion, 193 N. Y. A. D., 433; Record, page 27.

The plaintiff-in-error, to sustain his contention that value cannot be used as a basis of assessment without regard as to whether the property is improved or unimproved, cites as his principal and practically only case the *City of Boston v. Shaw*, 1 Metcalf, 130, and for that purpose quotes a part of this decision.

A reading of the full decision in this case will show that it has absolutely no application and arises by reason of a particular, special statute enacted to cover a specific sewer assessment. The statement which the plaintiff-in-error quotes is only an incident to the decision. The case itself was determined upon the ground that the statute having fixed the remedy for failure to pay the City of Boston was bound by that statute and could not bring an action in assumpsit.

The cases cited by us under our last point in reference to value are applicable with the same force and effect to the question here under discussion, and it is needless to repeat them or any part of them.

The Appellate Division in passing on this case covered this phase of the question when it said:

"I think it within the scope of legislative power to decide that improved property is benefited, as well as unimproved, according to its value" (Record, p. 27).

And the same Court further said (Record, p. 28) :

"Neither has the power of the Legislature to select the subjects of taxation providing there is a substantial basis for the classification ever been successfully challenged. So long as parties are treated alike with others in the same class and so long as they have an opportunity to be heard upon the apportionment of the tax as distinguished from the creation of the tax district and as distinguished from the classification of property that is to bear the burden of taxation there is no room for valid complaint."

It is the contention of the defendant-in-error here that the only proper, just and equitable method of assessment that can be had for the purpose of paying for the construction and maintenance of this sewer, is the method determined by the Legislature of the State of New York. Such method distributes the cost and maintenance of said sewer upon the basis of value of the property within the district whether such property is improved or unimproved, the improved property certainly having a direct benefit where it does or can connect with the sewer and the unimproved property likewise having an added value by reason of the fact that it is more valuable because it can have certain facilities.

POINT V.

The act in question properly and legally provides for a budget to care for the payment of bonds, interest, maintenance and incidental expenses in connection with this sewer.

Chapter 646 of the Laws of 1917, Section 6;

Horton v. Andrus, 191 N. Y., 231.

The statute in this case provides that all of the necessary expenses shall be taken care of in a budget to be adopted by the Board of Supervisors, including bonds, interest, maintenance charges, expenses of litigation and such other contingent or incidental expenses as might arise by reason thereof.

The plaintiff-in-error for some reason unknown to us endeavors to say that even if the act is constitutional in regard to the method and manner of levying the assessment that it is unconstitutional because it provides for the including in the budget of certain items designated by it under Point V of its brief.

The defendant-in-error contends that in the first place the courts of the State of New York having refused to approve the contention of the plaintiff-in-error, the question raised by it in Point V of this brief is not properly here as a constitutional question; that when the courts of the State of New York settled that question as against the plaintiff it is foreclosed and that the question is not here for consideration, and second, that even if it was properly here and is a constitutional question which might be considered by this court, still upon

the merits there is no justification for plaintiff-in-error's contention.

The contention of plaintiff-in-error seems to be directed more particularly to what is denominated the contingent fund and the litigation fund. As to the contingent fund we all know that after a budget has been adopted, there are certain incidental contingent expenses which are not properly chargeable under some other head and for which a fund is generally created. As to the provision for a litigation fund, there certainly is no provision in the statute for a legal staff to look after the interest of the district. So far and for the past several years that has been done by the office of the County Attorney, paid for by the entire County of Westchester, except only as to expenses in connection therewith. Some provision has to be made to care for litigation such as we are now having at the present time in the action brought by this plaintiff, and if the entire district could not pay for defending its own creation and its own existence, what subdivision can be charged with such payment?

The original Act, Chapter 646 of the Laws of 1905, and the amendments thereto, specifically provided for the maintenance of this sewer and that the same shall be under the care and control of the Board of Supervisors, after it has been completed and turned over by the Commissioners who were appointed under the various acts.

One of the questions submitted to the Court of Appeals in the case of *Horton v. Andrews*, 191 N. Y., 231, by which decision the original Bronx Valley Sewer Act was held constitutional, reads as follows:

"Does the enactment unconstitutionally delegate the powers of taxation to a commission having no governmental functions to determine, in its judgment or discretion, the amount to be raised by taxation?"

The Court of Appeals at that time appreciating the terms of the Act by which the control and management of this sewer was to be vested in the Board of Supervisors subsequent to its completions, said by Judge Cullen (p. 238) :

"We see no force in the suggestion that the taxpayer is without opportunity to appear before the Board of Supervisors and to be heard as to the apportionment of the assessment of the cost of the improvement between the several municipalities benefited thereby."

So in this case in reference to the maintenance, the taxpayer has the opportunity of appearing before the Board of Supervisors of Westchester County and question any item that may be submitted as a part or portion of the expense in connection with this improvement, as provided for in and by the provisions of Section 6 of Chapter 646 of the Laws of 1917.

We find similar provisions for maintenance and for expenses in connection with similar improvements, not only in this State, but in most of the States of the Union.

Sufficient to this point is it to call the attention of the Court to the fact that under the Town Law there is a provision for the construction of a sewer system in the town. In the laws of other States, there is a provision for the construction and maintenance of drainage districts, or irrigation districts, of levee districts, which districts in a good

many instances are made to cover parts or portions of several counties. In the maintenance thereof there is bound to arise between some of the parties interested therein and the Commissioners or others in charge of them, litigation, as to repairs to be made and various other expenses, and if the district is not to pay these expenses, who will pay them?

The construction and maintenance of a sewer is not fundamentally a governmental function of the town, or a county. It is, more strictly speaking, a municipal function of a city or a village and the Court of Appeals in the case of *Horton v. Andrus* held that the Act was proper on the question of the financing of the proposition by the County of Westchester, due to the fact that the county was the next largest municipal subdivision that contained the whole district. If that had not been the case, it would have been necessary to have appointed a Commission not only to construct the sewer, but to take care of its maintenance and operation after its construction, the same as the Legislature in this State did when it passed the Bronx Parkway Act, in which case certain lands in the City of New York and in the County of Westchester are provided for by a Commission.

The plaintiff-in-error also contends that it pays general taxes in the City of Yonkers upon all its property and that these taxes invariably include some of the expenses of the Sewer Department of that city.

True, this property is within the City of Yonkers and they undoubtedly pay, or are supposed to pay, their proportionate share of all of the general city taxes, but are they in any different position as be-

tween this sewer district and the City of Yonkers than is a property owner who lives in a village, pays his village taxes for village purposes and also helps to pay the town taxes, or vice versa?

It is our contention that the Legislature having defined a district, has provided for the construction of the sewer and the maintenance thereof and the construction and maintenance of that sewer is not one of the incidents of the county government in the way that the construction and maintenance of a sewer under certain statutory provisions might be a municipal function for a village or a city. The district having been formed, and the Legislature having prescribed the method of procedure, the district is chargeable with the total cost of the expense of this sewer and its maintenance. There is no other municipal subdivision which can be compelled to pay any part or portion of these charges and the people or the taxpayers who by the Legislature have been declared to be benefited by the district are the ones who should stand the expense in connection with it.

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first instance if it could have foreseen the actual results to follow upon its first enactments."

In the case of the *Matter of the City of New York*, 81 Misc., at page 553, Mr. Justice Scudder, quoting in part from the case of *Spencer v. Merchant*, said:

"In determining what lands are benefited by the improvement, the legislature may avail itself of such information as it deems sufficient, either through investigations by its committee, or by adopting as its own the estimates or conclusions of others, whether those estimates or conclusions previously had or had not any legal sanction."

"The Legislature has the power to fix an area of assessment without either notice or hearing to the people affected by that area, and also has power to delegate that function to subordinate governmental agencies. *People v. Mayor*, 4 N. Y., 419; *McLaughlin v. Miller*, 124 *id.*, 510; *Matter of Cruger*, 84 *id.*, 619.

"The right to compensation is the right of the citizen whose land is taken, which the Legislature can neither ignore nor deny. *The power of taxation on the other hand is vested in the Legislature and is practically absolute, except as restrained by constitutional limitations. The power of taxation being legislative, all the incidents are within the control of the Legislature. The purposes for which a tax shall be levied; the extent of taxation; the apportionment of the tax; upon what property or class of persons the tax shall operate; whether the tax shall be general or limited to a particular locality, and, in the latter case, the fixing of a district of assessment; the method of collection, and whether the tax shall be a charge upon both persons and property, or only on the land, are matters within the dis-*

*cretion of the Legislature and in respect to which its determination is final. * * **

"There is no constitutional guaranty that taxation shall be just and equal. * * *

"The Legislature may itself fix a district of assessment or the power may be delegated by the supreme legislative body to the authorities of subordinate political and municipal divisions or other official agencies, as may also the incidents of the power, such as the apportionment and distribution of the tax, as between the persons and property upon which it is laid. * * *

"The imposition of local assessments for benefits is an exercise of the taxing power.' *Genet v. City of Brooklyn*, 99 N. Y., 296." (Italics ours.)

The court below in the opinion by the Appellate Division (Record, p. 26), and which decision was affirmed by the Court of Appeals, clearly and decisively disposed of the question raised under this point when it said:

"It is competent for the legislature to create a tax district for the purpose of raising money to pay for improvements already made, and, likewise, to substitute one tax district for another."

POINT VII.

The case of *Horton v. Andrus*, 191 N. Y., 231, decided in 1908, settled all of the issues raised in this case.

Horton v. Andrus, 191 N. Y., 231;

Ashton v. City of Rochester, 133 N. Y., 187.

Nine questions involving every possible State and Federal Constitution objections were certified to the Court of Appeals in *Horton v. Andrus*, *supra* (see pp. 232 and 234), with the result that the original Bronx Valley Sanitary Sewer Act was upheld *in toto* and the decision in that case applies here.

It is claimed that this is not so because no assessment had been made at the time and additional legislation has been passed since then, but certainly the levying of the assessment and the passage of additional legislature pertaining to the method of levying the same does not alter the case.

Section 14 of the Original Act provides in part as follows:

"And for the purpose of raising money to meet said bonds and interest thereon, and for the maintenance of said sewer after construction, the supervisors of the County of Westchester shall annually, at the time the general tax levy is made, levy upon the real estate in each municipality within the area described and set forth in the maps and plans filed under Section Two hereunder as modified by this act, the proportion in which the assessed valuation of the real estate within such area bears to the assessed valuation of the entire property shown and laid out on the maps aforesaid. And the local authorities of each municipality shall assess, such amount *pro rata* on the real estate within the area benefited shown on the plans and maps afore-

said, within each municipality as modified by this act, based on the assessed valuation of real property within such area; and said local assessment shall be subject to a hearing and grievance day, as other assessments in such municipality, and the said taxes so levied shall be collected in the same manner as other taxes are levied and collected in said towns and cities and villages, and such levy, assessment or proportionate part shall be a like lien as general taxes until the amount thereof is paid to the treasurer of the County of Westchester, and the County of Westchester is hereby authorized and directed, in case of the refusal or neglect to pay into said treasury within the time required by law, an amount sufficient to meet such levy, assessment or proportionate part of the interest and principal of such bonds, and the cost of maintenance, to issue a certificate of indebtedness as in this act provided. The board of supervisors, at their annual meeting, after the commission created hereunder shall cease to exist, shall examine the assessment-roll of the several towns and cities lying within said sewerage area for the purpose of ascertaining whether the valuations of the real estate lying within the area in one town or city bears a just relation to the valuation of the real estate lying within the sewerage area in all the towns and cities in said county within said sewerage district, and they may increase or diminish the aggregate valuations of real estate in such sewerage area in each town or city by adding or deducting such sum upon the hundred as may, in their opinion, be necessary to produce a just relation between all the valuations of such real estate within said sewerage area, but they shall in no instance reduce the aggregate valuation of all the lands in said sewerage area below the aggregate valuations thereof made by the local assessors."

As we have before said Chapter 646 of the Laws of 1917 does not change the original plan as outlined by the Legislature, but simply makes it more explicit. Provisions for the apportionment of the assessment on valuation is in the original act. If these provisions of the original act were constitutional certainly the same provisions made more explicit by the supplemental act are constitutional.

Two of the nine questions certified to the Court of Appeals, namely, questions 7 and 8, are identical with the questions raised here by the demurrer.

On these two questions Chief Judge Cullen said (p. 238):

"We see no force in the suggestion that the taxpayer is without opportunity to appear before the Board of Supervisors and be heard as to the apportionment of the assessment of the cost of the improvement between the several municipalities benefited thereby. The statute provides (Sec. 14) that the apportionment or equalization shall be made by the Board at the annual meeting after the dissolution of the commission appointed to construct the sewer. This act, though local, is public, not private, and the taxpayers of the county are bound to take notice of it."

The remaining questions in that case were disposed of by the following (p. 235):

"We are of opinion that all of the objections to the validity of the statute raised by the appellant and comprehended in the questions certified to us, with one or, possibly, two exceptions, are destitute of merit, and we shall dispose of them simply by answering the questions certified to us.

"The exception to which we refer is the claim that the statute violates Section 10, Article VIII, of the State Constitution, * * *" (referring to the question of incurring indebtedness by the County, etc., which question is not in issue here).

It is apparent that all of the questions certified were considered, although plaintiff-in-error claims otherwise, in the court below. The nine questions were answered as follows (p. 238) :

"each of the questions certified answered in the negative."

In *Ashton v. City of Rochester*, *supra*, page 193, the following rule of law is stated:

"When a judgment is rendered against a county, city or town in its corporate name, or against a board or officer who represents the municipality in the absence of fraud or collusion, it will bind the citizens and taxpayers. This is upon the principle that they are represented in the litigation by agencies authorized to speak for them and to protect their interests."

Applying this rule, it seems to us that plaintiff-in-error is now estopped to raise the same questions that were raised in *Horton v. Andrus*.

POINT VIII.

The plaintiff cannot maintain this action in equity for the cancellation of taxes levied against its property.

Conde v. City of Schenectady, 164 N. Y., 258;

Stuart v. Palmer, 74 N. Y., 183.

The plaintiff-in-error in this case has entirely mistaken its remedy, because in an equity action to cancel taxes upon the ground that the act under which the taxes were levied is unconstitutional, the Court will not set them aside as being a cloud upon title.

The case relied on by plaintiff-in-error for bringing this action is the case of *Elmsford Fire Company v. The City of New York*, 213 N. Y., 87, but in that case no constitutional question is involved. The determination sought there was the construction of the statute in question.

The question before the Court is whether Chapter 646 of the Laws of 1917, as amended, is constitutional or not. If the act is constitutional as we claim, the demurrer must be sustained and if unconstitutional, the demurrer must likewise be sustained, because the assessments are not a cloud on title.

Plaintiff-in-error brought this action not for the construction of the statute as in the *Elmsford Fire Company* case, but has brought it in equity to set aside the taxes or assessments as a cloud on title on the ground that the act is unconstitutional.

In the case of *Conde v. The City of Schenectady*,

164 N. Y., 258, at page 263, Cullen, J., writing for the Court, said:

"If the statute is unconstitutional and void, the invalidity of the assessment is apparent and an action in equity to set it aside as a cloud upon title cannot be maintained."

He cites the case of *Stuart v. Palmer*, 74 N. Y., 183, and in that case as pages 187 and 188, Judge Earl, writing for the Court, said:

"We shall examine and consider but one question which we deem decisive of this case, and that is whether the act authorizing the assessment was constitutional. If it was unconstitutional, no valid assessment can be made under it; and the invalidity of the assessment would always appear, and it could constitute no such cloud upon title as to call for the interference of a court of equity."

It is not the purpose or desire of the defendant-in-error the County of Westchester in this case to have the same decided upon anything else but the merits and we do not believe that the cases herein cited will ultimately have any bearing on the determination. We are satisfied that we have shown this Court conclusively that the acts of the Legislature were entirely within the constitutional limitations and that they are a just and proper exercise of legislative discretion."

POINT IX.

The claims of plaintiff-in-error have already become too unsubstantial to support the jurisdiction of this Court.

*Miller & Lux v. Sacramento & San Joaquin
Drainage District*, 256 U. S., 129;
Chapter 448, 39 Stats., 726, Act of September 6, 1916.

POINT X.

The writ of error should be dismissed, and if not dismissed the judgment should be affirmed.

Dated January 3rd, 1923.

Respectfully submitted,

WILLIAM A. DAVIDSON,
County Attorney,
Counsel for Defendant-in-Error.

CHARLES M. CARTER,
With him on the brief.

[8932]